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NO. PD-0053-17

THE STATE OF TEXAS,

Appellant,

v.

DANIEL VILLEGAS,

Appellee.

Appealed from the 409th Judicial District Court
And the Court of Appeals for the Eighth District of Texas
El Paso, Texas

BRIEF OF APPELLEE DANIEL VILLEGAS

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TABLE OF CONTENTS

APPENDIX

INDEX OF AUTHORITIES

Texas Cases **Page**

Federal cases

Statutes

Rules

STATEMENT OF THE CASE

In a transparent attempt to prejudice this Court, Appellant's five-page Statement of the Case is argumentative and focuses on contentions irrelevant to this appeal, in violation of the Texas Rules of Appellate Procedure. (Appellant's brief in support of p.d.r. [herein, "A'nt brf."] pp. xi-xv). The statement of the case "must state concisely the nature of the case ... the course of proceedings, and the trial court's disposition of the case[;]" "should seldom exceed one-half page, and should not discuss the facts." TEX.R.APP.P. 38.1(d); *see also* TEX.R.APP.P. 70.3 ("Briefs must comply with the requirements of Rules 9 and 38[.]") Appellee objects to Appellant's Statement of the Case, but must respond to its argumentative allegations.[1] *See* TEX.R.APP.P. 38.2(a)(1)(B) ("the appellee's brief need not include a statement of the case ... unless the appellee is dissatisfied with that portion of the appellant's brief[.]").

Daniel Villegas is accused of murdering two young men in 1993, when he was sixteen years old. (1CR:5-6 [indictment]; 16CR:5828 [age]). He was tried in 1994 for the crime, resulting in a mistrial. (1CR:95). When he and his family could not

[1] This is particularly true because Appellant has repeatedly argued, in the court below and in this Court, that Villegas must agree with its statements when he does not object – even if those are mere sidebar statements irrelevant to the issues then before the court. *See, e.g.*, A'nt brf., p. 30 n. 25. To avoid any future claim that he agrees with anything stated in Appellant's brief, Villegas denies every factual, procedural and legal assertion in that brief which is not expressly adopted herein.

continue to afford paying his counsel, the court appointed a new attorney to represent him – even though the retained counsel offered to continue serving as appointed counsel. (19CR:6760). The new attorney had only about 60 days to prepare for the trial of the double murder prosecution. (18CR:6262). By his own admission, he overlooked or did not utilize substantial amounts of "vital, material, and relevant" evidence, missed several key issues, and did not prepare or have time to prepare as the case required. (18CR:6262-65). At the second trial, Villegas was convicted and sentenced to serve the rest of his life in prison. (10CR:3414). Eighteen years later, he was granted habeas corpus relief based on ineffective assistance of counsel. *Ex parte Villegas*, 415 S.W.3d 885 (Tex.Crim.App. 2013).

Appellant's statement of the case refers to the trial court's finding that the State made numerous and inexcusable mistakes and omissions, then claims that this finding is "unsubstantiated." (A'nt brf. p. xii & n. 2). In fact, the finding is well-substantiated by the record. These mistakes and omissions are detailed in the Statement of Facts. By way of summary, the State's numerous and inexcusable mistakes and omissions include:

- The State "investigated" the crime by threatening and intimidating teenaged witnesses until they gave false confessions, including the false confession of one who was undisputedly innocent, false confessions of two other purported accomplices who were not charged due to insufficient evidence, and the near-confession of one of the surviving victims. (See Statement of Facts, ¶ D, G).

- The State was permitted to take David Rangel into custody and interrogate him after making false representations to his mother about the nature of their investigation. Rangel, under pressure and intimidation, repeated Daniel Villegas's joking statement to him that he was responsible for the crime. He told the State that Villegas was joking, but the State threw away his first statement because it contained a significant detail that was inconsistent with the facts of the crime, and ordered Rangel to sign a statement without that detail. (See Statement of Facts, ¶ D.4).

- Upon taking Villegas into custody, the State refused to take him to a designated juvenile processing office before stopping elsewhere, as required by Texas law. (See Statement of Facts, ¶ F).

- The State extracted a false confession from Villegas by intimidation and threats of violence. Before taking Villegas before a magistrate, the State threatened him with violence if he did not tell the magistrate he was going to confess. (See Statement of Facts, ¶ F).

- The State crumpled up and threw away Villegas's first statement. (See Statement of Facts, ¶ F).

- While coercing Villegas's false confession, the detectives also collaborated to make another young man who was simultaneously being interrogated provide a false statement consistent with Villegas's coerced confession. (See Statement of Facts, ¶ G).

- After the first trial of Villegas, a private investigator notified the district attorney that he had secured a taped interview of a witness with exculpatory information. The State took this tape from the investigator and lost or destroyed it. (See Statement of Facts, ¶ K).

- At the second trial of Villegas, the State persuaded his newly-appointed counsel to enter an incorrect factual stipulation, despite the fact that the proceedings from the first trial demonstrate that the State knew that stipulation to be false, then relied on that false stipulation to argue Villegas's intent to the jury in the second trial. (See Statement of Facts, ¶ L).

- During the habeas corpus proceedings, the State provided the court with a demonstrably false affidavit to attempt to avoid habeas corpus relief. (See Statement of Facts, ¶ N.2).

- During the habeas corpus proceedings, the State secured an affidavit from an alternative perpetrator after limiting his access to his attorney, taking him from the jail to meet with him at its office, and promising him the affidavit would not be used or would be withdrawn if he desired to exercise his Fifth Amendment privilege. When the perpetrator did plead the Fifth Amendment at the hearing, the State refused to withdraw the affidavit, effectively providing its version of the alternative perpetrator's claims while denying Villegas the ability to cross-examine him. (See Statement of Facts, ¶ N.1).

- During the habeas corpus proceedings, the State obtained a recording of a jail conversation, and falsely claimed that Villegas stated in that recording that he was "not innocent." Villegas did not make that statement. Nonetheless, the State persists in claiming in this appeal that he did so. (See Statement of Facts, ¶ N.3; A'nt brf. pp. 6, 7, 45, 46).

Clearly, Appellant's claim that the trial court's recognition of its mistakes and omissions is "unsubstantiated" is inconsistent with the record.

Offended by the trial judge's recognition of its own misconduct, Appellant blamed the messenger, moving to recuse the trial judge on the basis of his findings based on the evidence. (21CR:7400). Because it is well-established that recusal does not lie for findings and opinions developed while presiding over a case,[2] Appellant's frivolous recusal motion was denied. (21CR:7501). Its second desperate motion to recuse the same judge was also denied. (22CR:7763, 7788).

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[2] *Gaal v. State*, 332 S.W.3d 448, 454 (Tex.Crim.App. 2011).

In advance of the third trial, Appellant produced approximately 1400 hours of recorded conversations between Villegas and others while he was in custody. (3RR:5-6). The trial court asked Appellant to confer with Villegas's counsel about which recordings were relevant, and to determine whether there was a disagreement about their contents. (3RR:6-7). Appellant's counsel stated that all of the hundreds of hours of recordings it had produced were relevant. (3RR:7).

Recognizing the futility of attempting to listen to hundreds of hours of audio recordings outside of the jury's presence during trial to determine their admissibility, the trial court instructed Appellant to identify the particular recordings it wished to offer at trial, and conducted a pretrial hearing on their admissibility. (21CR:7559; 9RR:1-98). This appeal arises from the trial court's order excluding 37 of these recordings because they are irrelevant; because any possible relevance is outweighed by the other considerations of Rule 403; and because they are hearsay. (22CR:7842).

The State's notice of appeal recites that "The State certifies that jeopardy has not attached in this case, the appeal is not taken for the purpose of delay, and the evidence is of substantial importance in the case." (22CR:7843). However, it does not include any such certification by the elected prosecutor personally, as opposed to on behalf of the State. (22CR:7842-44; see Appendix 3).

The Court of Appeals denied Villegas's motion to dismiss this appeal for want of jurisdiction. *State v. Villegas*, 460 S.W.3d 168 (Tex.App.–El Paso 2015, order). Finding that the trial court did not abuse its discretion in the exclusionary order at issue, the Court of Appeals affirmed. *State v. Villegas*, 506 S.W.3d 717 (Tex.App.–El Paso 2017, pet. granted).

This Court granted discretionary review. The Court should not allow Appellant's argumentative Statement of the Case to prejudice it in reviewing the grounds presented.

ISSUES PRESENTED

I. There is no appellate jurisdiction, because the elected prosecuting attorney did not personally certify to the matters which he is required to personally certify in an appeal by the State.

II. Appellant's first ground for review argue, in part, that the trial court erred in excluding evidence at a pretrial hearing based on Rules of Evidence 402 (relevance), 403 (balancing relevance against other concerns), or 802 (hearsay).

A. This complaint was not preserved in the trial court.

B. The decision to conduct a pretrial hearing is not an appealable order.

C. Appellant's argument that the trial court erred in excluding evidence on the basis of hearsay at a pretrial hearing was not preserved for this Court's review in the Court of Appeals.

D. The trial court did not abuse its discretion in ruling on admissibility of evidence in a pretrial hearing.

III. Appellant's first ground for review argues, in part, that the trial court erred in placing a burden of proof on the State at a pretrial hearing.

A. This complaint was also not preserved in the trial court.

B. The record does not reflect that any burden of proof was placed on the State.

C. Even if the trial court placed a burden of proof on the State, it did not err in doing so.

1. In a motion to exclude evidence based on Rules of Evidence, rather than constitutional or statutory violations, the burden is the same as it would be at trial.

2. Even if the initial burden was on Villegas, he satisfied that burden by presenting the recordings to the trial court; the parties agree the recordings were constructively admitted into evidence.

3. The burden of proving conditional relevance and hearsay exceptions is on the party offering evidence.

IV. Appellant's second ground for review argues that the Court of Appeals misapplied the standard of review for exclusion of evidence on relevance and Rule 403 grounds.

A. The Court of Appeals did not misapply the standard of review. Appellant is effectively seeking *de novo* review, when the abuse-of-discretion standard applies.

B. The trial court did not abuse its discretion in excluding the jailhouse recordings as irrelevant.

C. The trial court did not abuse its discretion in excluding the jailhouse recordings because any slight probative value is outweighed by the considerations of Rule 403.

D. Appellant's argument within its second ground also challenges the exclusion of evidence as hearsay, but the grounds presented in Appellant's petition for discretionary review do not provide a basis for reviewing the trial court's hearsay rulings.

E. The trial court did not abuse its discretion in excluding the jailhouse recordings as hearsay.

STATEMENT OF FACTS

Daniel Villegas, Appellee, spent almost two decades behind bars for a crime he did not commit. The State of Texas, Appellant, seeks to appeal pretrial evidentiary rulings in advance of the third trial for the same crime. Appellant's brief includes its own version of the underlying circumstances, inappropriate accusations, reliance on coerced and false statements, and sidebar denials that the State has ever made any mistakes or omissions in the prosecution of Villegas. Appellant includes these accusations merely in an effort to prejudice this Court against Villegas. To fully respond, Appellee is forced to provide a detailed description of the evidence and proceedings. Appellee disputes Appellant's statement of facts in its entirety. TEX.R.APP.P. 38.1(g).

A. The shooting.

Shortly after midnight on April 10, 1993, Armando Lazo, Robert England, Jesse Hernandez, and Juan Medina were walking home from a party. (19CR:6697)[3]. When they reached the intersection of Woodrow Bean Transmountain Road and Electric Street, gunfire erupted from the passenger side of a vehicle on Electric Street.

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[3] Both parties' briefs include citation to the reporter's record of the two trials and the hearings on the application for writ of habeas corpus, which are included in the clerk's record. As pointed out by the Court of Appeals, the trial court took judicial notice of those records in this case, by agreement of the parties. *Villegas*, 506 S.W.3d at 731.

(19CR:6697, 5CR:1535). Lazo and England were killed. (5CR:1640,1645; 19CR:6703). [*See* Appendix 1, Findings 1-3].

England suffered a single gunshot wound to the head and died shortly thereafter. (5CR:1705). His body was discovered approximately 148 feet from six .22-caliber bullet casings that were later found grouped together on Electric Street. (5CR:1592-94, 1616-17, 1627-28). [*See* Appendix 1, Finding 2].

Lazo was shot once in his abdomen and once in his thigh, with both bullets entering the front of his body. (15CR:5401-06; 18CR:6615-16, 6631). His body was found on the doorstep of the corner home belonging to George and Nancy Gorham, across the street from where the shots originated. (5CR:1569). The Gorhams called 9-1-1 at 12:18 a.m., after hearing a series of five or six consecutive gunshots and the sound of someone knocking at their front door. (5CR:1566-67; 19CR:6736). Except for the cluster of six casings found on Electric Street, no shell casings were found near the Gorhams' door or anywhere else in the vicinity. (15CR:5387). [*See* Appendix 1, Finding 3].

B. Daniel Villegas was not involved in the shooting.

Daniel Villegas did not have anything to do with the shooting. (16CR:5824). That night, he was with Marcos Gonzalez and Rodney Williams. (16CR:5870-71). At the time of the shooting, they were watching movies at the apartment of Linnette

Moore, at the Village Green Apartments. (16CR:5878). Gonzalez, Williams, and Lesley Williams agree with Villegas that he was watching movies at that particular apartment at the time of the shooting; and although she left the apartment earlier, Moore testified that Villegas, the Williamses, and another friend were on the stairs outside of her apartment when she left and told her they were going to watch movies there. (6CR:1981-84 [Gonzalez]; 3CR:905-08, 6CR:1732-33, 9CR:3095-98 [R. Williams]; 4CR:1280-81, 7CR:2254-60 [L. Williams]; 7CR:2318 [Moore]). [*See* Appendix 1, Findings 17(c), 62, 63, 67].

Appellant's brief incorrectly claims that Villegas presented inconsistent alibis. First, it incorrectly claims that he presented an inconsistent alibi, that he was at Boomerangs Theater at the time. (A'nt brf. p. 5). The testimony below, including the testimony cited in Appellant's brief, was that he was at this theater earlier that evening, and that he went to the apartment after leaving that theater. (7CR:2293-97, 2325-28; 16CR:5875-78).

Appellant's brief further incorrectly claims that Villegas gave another inconsistent story to the juvenile probation officer, that he was at the home of "Negro." (A'nt brf. p. 5 n. 7). Villegas explained that "Negro" also lived at the Village Green Apartments, and he gave his name to the probation officer as a potential witness to his location. (16CR:5920). Indeed, the officer's notes reveal that

Villegas gave her this information in response to her question, "if he could produce someone to testify to him being elsewhere." (19CR:6696). No inconsistency exists.

Despite his alibi, Villegas (who was sixteen years old at the time) confessed to the crime. (16CR:5824). His confession was false, but it was coerced by threats and intimidation from El Paso Police Detective Alfonso Marquez, who led the investigation, under circumstances detailed below. (16CR:5824; *see section F of this Statement of Facts, infra*; *see* Appendix 1, Findings 29-40; Appendix 2, Findings 13-45). The tactics employed by Marquez and Detective Scott Graves were so extreme that they also caused least one other individual, 15-year-old Michael Johnston, to falsely confess to committing the same murders, although Marquez later concluded he was not involved (7CR:2150, 6CR:1841, 15CR:5498-99; *see Section D.2 of this Statement of Facts, infra*); caused 15-year-old Rodney Williams to falsely confess that he was in the car at the time of the shooting, even though murder charges against him were dismissed due to lack of evidence (6CR:1777-78; 14CR:4991-99, 5007; 17CR:6251; *see Section D.5 of this Statement of Facts, infra*); caused Gonzalez to falsely confess that he was in the car at the time of the shooting, even though charges against him were also later dropped (6CR:1952-53, 1972-73, 1976, 1849; 19CR:6720-21; *see Section G of this Statement of Facts, infra*); and even caused

surviving victim Hernandez to come close to confessing himself (14CR:4817-18; *see Section D.1 of this Statement of Facts, infra*).

Villegas retracted his false confession as soon as he was away from Detective Marquez's influence. (4RR:38-39; 19CR:6696; *see Section I of this Statement of Facts, infra*). His false confession is inconsistent with physical evidence from the crime scene and contains details that are physically impossible. (*See Section H of this Statement of Facts, infra*). It is inconsistent with other evidence uncovered as part of the investigation. (*Id.*). According to El Paso Police Detective Earl Arbogast, who participated in the investigation, there is no evidence corroborating any part of Villegas's coerced statement. (4RR:152).

The survivors, Hernandez and Medina, did not recognize the shooter. (15CR:5388). They did not identify Villegas as being at the scene. (15CR:5388-89). The police investigation uncovered no physical evidence that tied Villegas to the scene. (15CR:5388). There was no forensic evidence tying Villegas to the scene. (15CR:5388). There was no scientific evidence tying Villegas to the scene. (15CR:5388). He was convicted on the basis of his false confession. (19CR:6843).

C. Evidence of Rudy and Javier Flores's involvement in the shooting.

Shortly after the shooting, Tonya Vinson, Terri Vinson, Charles Blucher, and Terrance Farrar all contacted the police to alert them that they believed Rudy Flores

and/or Javier Flores were responsible for shooting Lazo and England. (19CR:6698). Rudy Flores was a fifteen-year-old LML gang member, also known as "Dust." (19CR:6644,6698). Javier Flores was Rudy's twenty-year-old older brother, also known as "Dirt." (19CR:6646, 6698). [*See* Appendix 1, Findings 4, 9]. Because they share the same surname, Rudy and Javier are referred to herein by their first names.

Two weeks before the shooting, Rudy had a confrontation with England and Lazo at a party, and threatened to kill Lazo. (17CR:6253). Rudy had a car that was similar to the one described by the surviving victims. (17CR:6253). Javier also had confrontations with Lazo and fought him at school. (14CR:5104). [*See* Appendix 1, Findings 4, 126, Conclusions p. 46].

Rudy gave a statement to the police, which included the following information:

- Rudy drove past the same party the victims were at on Jamaica Street at approximately 11:00 p.m. on the night of the murder.
- At around midnight, Rudy was in a car traveling east on Transmountain Road.
- Between 12:15 and 12:20 a.m., he was in that car near Transmountain and Electric Street (the location of the shooting).
- Rudy claimed he then went home. His home was located just one or two minutes away from the scene of the Electric Street shooting.

(19CR:6644-45). This information placed Rudy at the scene of the crime at the time of the shooting, i.e., shortly before the Gorhams called 9-1-1 at 12:18 a.m. Contradicting Rudy's statement that he got home a minute or two after leaving that location at about 12:20, Javier gave a statement to the police stating that he lived with Rudy, and that when Javier arrived home at approximately 12:30 a.m. that night, Rudy was not home. (19CR:6646-47). [*See* Appendix 1, Findings 10, 11].

Connie Serrano (formerly Connie Martinez) testified during the hearing on Villegas's application for writ of habeas corpus. (14CR:5220). Her testimony included information regarding the possible killer, one of the Flores brothers, and the location of a .22 caliber gun she saw taken from a closet in the Flores home shortly after the shooting of Lazo and England. (14CR:5221-25, 5229). Martinez-Serrano tried to come forward with this information in 1993, but could not get anybody to listen to her. (14CR:5229, 5244). [*See* Appendix 1, Finding 129(b)].

Later on the night after the shooting, gunshots were reported on Shenandoah Street, in close proximity to the scene of the Electric Street shooting. (15CR:5409-11; 19CR:6706-07). Rudy was present during the Shenandoah Street shooting. (19CR:6706). A .22-caliber weapon was recovered by police in connection with the Shenandoah Street shooting. (15CR:5412; 18CR:6608). The recovered weapon has since been destroyed by the El Paso Police Department. (15CR:5414).

Unfortunately, it was never tested against the .22-caliber casings recovered from the Electric Street shooting earlier that day. (15CR:5416). [*See* Appendix 1, Finding 7, Conclusions p. 47].

Rudy and Javier later boasted that Villegas was locked up for what they did. (14CR:5172-73). Javier has since passed away. At Villegas's writ hearing, he called Rudy Flores as a witness. (16CR:5745). Before his scheduled testimony, he was summoned from his jail cell to the district attorney's office, where he was interviewed at length by an assistant d.a. (16CR:5764, 5770). He then refused to answer any questions, invoking his Fifth Amendment privilege. (16CR:5754-55). He specifically refused to answer any questions about his statements to the police in reference to the night of the shootings. (16CR:5802-05). He maintained his refusal in spite of the trial court informing him that he could not claim the privilege and could be held in contempt for refusing to answer, and the court did eventually hold him in contempt. (16CR:5802-05). [*See* Appendix 1, Findings 129(a), 131, Conclusions p. 48].

D. Police Detective Alfonso Marquez "investigated" the crime by threatening and intimidating teenaged witnesses until they said what he wanted to hear, regardless of the truth.

El Paso Police Detective Alfonso Marquez led the investigation. (6CR:1805). Marquez's means of investigation was to harass, intimidate, and frighten young men and teenaged boys until they told him what he wanted to hear, specifically:

1. The threatening interrogation and near-confession of surviving victim Jesse Hernandez.

Jesse Hernandez, one of the surviving victims, gave a statement to police on the date of the shooting. (14CR:4814-15). Two days later, Marquez brought him back to the police station for more questioning. (14CR:4815). At this interview:

- Marquez asked Hernandez to write a description of the events leading up to and including the Electric Street shootings. While Hernandez was writing, Marquez took the statement, told him to "just cut the bullshit," and threw the statement back at Hernandez. (14CR:4815-16).
- Marquez accused Hernandez of killing his friends. He lied to Hernandez, claiming that Medina had already implicated him. He made Hernandez wonder if he had "blacked out" and killed his friends. (14CR:4816-17).
- Marquez threatened Hernandez that if he didn't confess, he would go to jail and get the death penalty. He brought Hernandez to tears. (14CR:4816).
- Hernandez did not confess to the crime, but testified that he was close to falsely confessing to killing his friends based on Marquez's interrogation. He "would have signed anything" to get out of there. (14CR:4817-18).

[Appendix 1, Finding 8; Appx. 2, Finding 54]. In a separate interrogation of surviving victim Medina, Marquez also accused him of committing the murders. (22CR:7567).

2. The threatening interrogation and false confession of Michael Johnston.

Marquez also participated in the arrest, transport from New Mexico to El Paso, and questioning of fifteen-year-old Michael Johnston. (6CR:1836). The circumstances of this questioning were as follows:

- Detectives Marquez and Graves interrogated Johnston for eight hours, from 7:00 p.m. on April 15 until 3:00 a.m. on April 16, 1993. (7CR:2137-38).
- Johnston was handcuffed during the entire eight hours. (7CR:2137-38).
- Marquez accused Johnston of shooting Lazo and England, and lied to him that Johnston's friend had implicated him. (7CR:2138-39).
- Marquez screamed in Johnston's face, with split flying out of his mouth while he was screaming. (7CR:2140).
- Marquez threatened Johnston with the electric chair if he did not confess, promising to pull the switch himself. (7CR:2140).
- Marquez threatened to take Johnston to jail where he would be molested and raped if he did not confess, but he promised to let Johnston off easy if he did confess. (7CR:2138-39).
- Johnston feared the detectives and feared for his life. (7CR:2141).

- Johnston was so scared that he eventually confessed to shooting Lazo and England. (7CR:2150, 6CR:1841).

Johnston was never charged with this crime. Marquez later admitted that Johnston's confession was false and he had nothing to do with the shooting. (15CR:5498-99). [*See* Appendix 1, Finding 12; Appendix 2, Finding 55].

3. The threatening interrogation of Wayne Williams.

Marquez interrogated Wayne Williams. According to an assistant district attorney's description of his interview of Wayne Williams:

- Detective Marquez accused him of committing the murders. (22CR:7567).
- Marquez told him other people witnessed him committing the double homicide. (22CR:7567).
- Wayne Williams felt that Marquez would have hit him, if they had not been at a juvenile detention center at the time. (22CR:7567).

4. The threatening interrogation and false statement of David Rangel.

On April 21, 1993, the El Paso Police Department contacted Patricia Cate, telling her they needed to speak to her seventeen-year-old son David Rangel regarding a telephone harassment complaint. (14CR:4849-50). They threatened her with an obstruction of justice charge if she did not cooperate. (14CR:4850). Instead

of telephone harassment, Rangel was questioned about the shooting by Detectives Marquez and Lozano. (14CR:4881-82). The circumstances were as follows:

- Marquez accused Rangel of committing the murders and lied to him that others had already implicated him in the shooting. (14CR:4882-83).
- Marquez threatened Rangel with life in prison if he did not confess, and warned him that he was a "pretty white boy with green eyes" who could expect to be "f****d" in prison. (14CR:4883-84).
- Rangel did not know what Marquez was talking about. However, during the questioning, he remembered a "creative story" that his cousin Daniel Villegas told him over the phone. (14CR:4885, 4889).
- Rangel told the detectives that during a telephone call with Villegas and Marcos Gonzalez, Villegas told him about shooting at the victims with a shotgun. (14CR:4887-89).
- Rangel told the detectives that Villegas and Gonzalez were laughing during the conversation and Rangel believed Villegas was joking. (14CR:4888).
- Rangel wrote a statement documenting this phone call with Villegas and Gonzalez, including the detail that Villegas said he shot at the victims with a sawed-off shotgun. (14CR:4889).

- Marquez, after reading the statement, threw it in the garbage and told Rangel it was "not correct" that Villegas used a shotgun. (14CR:4889, 4891-92).
- Marquez ordered Rangel to sign another statement that purported to document the conversation, but did not mention the type of gun used. (14CR:4893).
- Marquez threatened that if Rangel did not sign the new statement, he would be charged with the crime and would not be released. Rangel signed the statement, explaining that he was willing to sign "pretty much what was in front of" him as he was "just trying to get out of there." (14CR:4898).

[*See* Appendix 1, Finding 14; Appendix 2, Finding 56].[4]

Appellant's brief incorrectly claims that Villegas's purported telephonic confession to Rangel, as described in the statement Rangel signed, was consistent with the details of the crime. (A'nt brf. p. 2). Besides the detail that a shotgun was used, which Marquez ordered Rangel to remove from his statement, the statement was inconsistent with other evidence already uncovered in the investigation, including the following details:

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[4] Contrary to Appellant's accusation of inconsistencies, Rangel has testified consistently about how the statement was obtained since the 1994 suppression hearing, prior to the first trial. (2CR:403-07). The trial court found that these were the circumstances in which his statement was obtained. (Appendix 1, Finding 14; Appendix 2, Finding 56).

Rangel's description of Villegas's story	*Other evidence*
Villegas was in a black car. (17CR:6248).	Surviving eyewitnesses Hernandez and Medina described the car as red, maroon, or "goldish." (17CR:6244, 19CR:6708).
On the initial encounter, Villegas ordered one of the victims to stop, at which point the victim stopped and "threw his gang sign" at Villegas. (17CR:6248).	Surviving eyewitnesses Hernandez and Medina did not describe any such verbal exchange or hand gestures on the initial encounter. (17CR:6244; 5CR:1557-58).
Villegas shot Lazo once, saw Lazo run to a nearby home, and then "chased him to the house and there shot him again." (17CR:6248-49).	No shell casings were recovered near Lazo's body or anywhere else other than the location on Electric Street from which Hernandez and Medina said the shots originated. (15CR:5387). The Gormans reported hearing a single series of five or six consecutive shots, not two shootings. (5CR:1566-67; 19CR:6736, 6804-05).

[*See* Appendix 1, Finding 15]. According to Appellant, Villegas became a suspect after Rangel gave this statement. (A't brf. p. 2).

5. The threatening interrogation and false statement of Rodney Williams.

That same day, 15-year-old Rodney Williams was questioned. (14CR:4979-81). Detective Earl Arbogast was the first to question Williams; he concluded his questioning after determining Williams had nothing relevant to add to the

investigation. (13CR:4528-29). Detective Graves then began questioning Williams. (13CR:4529). The circumstances of this questioning were as follows:

- Fifteen-year-old Williams was interrogated for five to six hours. He asked to see his mother but Graves refused these requests. (14CR:4983-84).
- Graves insisted that he knew Williams was involved and present when Villegas shot Lazo and England on Electric Street; Williams maintained that neither he nor Villegas were involved. (14CR:4982).
- Williams told Graves that he and Villegas were watching movies at the Village Green apartment complex on the night of the murders. (14CR:4988-89, 4991).
- Graves threatened that, if Williams did not admit his involvement in the shooting, he would be charged and go to jail, where he would be brutally raped. (7CR:1775; 14CR:4986).
- Graves promised Williams that they wanted to prosecute Villegas, and they were not interested in going after Williams. (14CR:4983).
- Graves promised Williams he could go home if he did give an inculpatory statement. (14CR:4985-86).
- The detectives told him what to put in the statement. (14CR:4985-86).
- Williams eventually agreed to sign a typed statement prepared by officers, despite the fact that the statement was untrue. (14CR:4991-99).

[*See* Appendix 1, Finding 17].[5]

The statement signed by Williams stated that he and Villegas were in a car with Marcos Gonzalez and two others nicknamed "Popeye" and "Snoopy." (17CR:6251). It asserted that "Popeye" handed Villegas a gun, Villegas fired out the window, one of the victims fell to the ground, and the other was shot in the back. (17CR:6251). After signing the statement, Williams was arrested for capital murder. (6CR:1777; 14CR:5004). Charges against him were dropped after the prosecutor announced in open court that there was insufficient evidence to charge him. (6CR:1778; 14CR:5007). [*See* Appendix 1, Findings 18, 19].

E. Daniel Villegas was susceptible to the type of coercive interrogation tactics employed by Marquez.

Dr. Richard Leo, a renowned expert on false confessions, explained that suggestibility, compliance, and being a juvenile with a low IQ are characteristics making a person susceptible to coercive police tactics. (15CR:5662-64). Prior to his statements in April 1993, Villegas had a particular vulnerability to falsely confessing under the type of coercive police interrogation employed by Marquez, as established by the following testimony:

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[5] Appellant asserts that Williams has testified inconsistently. (A'nt brf. p. 13). Williams has testified consistently about how the statement was obtained since his first testimony, in the 1994 trial. (6CR:1773-77). The trial court found that these were the circumstances in which it was obtained. (Appendix 1, Finding 17).

- Priciliano Villegas, Villegas's adopted father, testified that Villegas has a learning disability, reads poorly, and dropped out of school in seventh grade. (7CR:2188). He described Villegas as impressionable, easy to trick, and someone who thought more like a child than an adult. (7CR:2191-92). He also testified that Villegas tells people what they want to hear and was prone to boasting. (7CR:2195).
- Alberto Renteria, who was a detention officer at the Juvenile Probation Department in 1993 when Villegas was in custody, testified that Villegas was a "very slow thinker" and had a very difficult time understanding Renteria's instructions. (14CR:5091).
- Jesus Lechuga, the bond officer for Villegas prior to trial, to whom he reported for 12-18 months, testified that Villegas was a very poor reader with very poor comprehension; for example, Villegas did not understand that a "home" was the same thing as a "house." (14CR:4931-33).
- Patricia Cate, Villegas's aunt, testified that he was prone to boasting and exaggeration. (7CR:2241, 2244-45).
- Dr. Angel Marcelo Rodriguez-Chevres, a forensic psychiatrist who conducted a court-ordered psychiatric evaluation of Villegas, diagnosed him with a

variety of conditions which could make him impulsive and a poor decision-maker. (19CR:6769-70).

- Dr. Rodriguez-Chevres testified that these traits could "easily" lead him to confessing to a crime he had nothing to do with, and he could be easily influenced to sign a false confession. (19CR:6770).

[*See* Appendix 1, Finding 70; Appendix 2, Findings 49-52].

Marquez boasted that he could obtain a confession to this crime at any point if "he really wanted to." (10CR:3258). [*See* Appendix 1, Finding 79(c); Appendix 2, Finding 63]. In these circumstances, it is hardly surprising that he was able to obtain a false confession from Villegas.

F. Sixteen-year-old Villegas was coerced into a false confession.

On April 21, 1993, Daniel Villegas was sixteen years old. (16CR:5828). Shortly after 10:00 p.m. that night, Detectives Marquez and Arbogast entered Villegas's home with an arrest warrant for Marcos Gonzalez. (16CR:5274-25, 5825). Gonzalez, an 18-year-old adult, was placed under arrest. (16CR:5725). As the detectives were leaving, Villegas asked them why they were arresting Gonzalez. (16CR:5825-26). After learning the identity of Villegas, Marquez placed him under warrantless arrest. (16CR:5825-26). [*See* Appendix 1, Finding 20; Appendix 2, Findings 1, 2].

The Texas Family Code restricts the actions of law enforcement officers while a juvenile is in custody. TEX.FAM.CODE § 52.02. Officers are required to take certain actions without unnecessary delay, and without first taking the juvenile to any place other than a designated juvenile processing office. *Id*. Arbogast was not even aware of this requirement. (4RR:132). Upon taking him into custody, Marquez and Arbogast did not take Villegas directly to a juvenile processing office or detention office or facility designated by the juvenile court without unnecessary delay. Instead, Villegas was driven to various locations in Northeast El Paso and asked about other individuals, and then the officers stopped to confer outside of the vehicles while Villegas and Gonzalez stayed in their cars. (16CR:4826-28). [*See* Appendix 1, Findings 21-23, Conclusions p. 61; Appendix 2, Findings 7-10].

Villegas and Gonzalez were then driven to the El Paso Police Headquarters. (16CR:5828-29). During this drive, Villegas repeatedly informed Marquez that he was a juvenile. (16CR:5829). Marquez accused Villegas of lying about his age. (16CR:5829). [*See* Appendix 1, Finding 24; Appendix 2, Finding 12].

As they came to the police station, Marquez threatened Villegas, using explicit language, telling him that he was "going down for the murders," and "We know you did these shootings and we are taking your ass to jail." (16CR:5828-29). About ten to fifteen minutes after arriving at police headquarters, Marquez confirmed that

Villegas was, in fact, just sixteen years old. (16CR:5829-30). Marquez told Villegas he was a "lucky punk" and transported him to Juvenile Investigative Services.[6] (16CR:5829-30). [*See* Appendix 1, Finding 24; Appendix 2, Findings 13, 14].

Marquez and Arbogast transported Villegas to the Juvenile Investigative Services office at approximately 11:30 p.m. (4RR:107; 13CR:4546). There, Villegas was placed in a room and handcuffed to a chair by Marquez. (16CR:5831). Villegas was questioned by Marquez, and the following occurred:

- Villegas remained handcuffed to a chair while he was questioned for about an hour. (16CR:5831-32).
- Marquez repeatedly accused Villegas of committing the shooting, telling him that Williams had implicated him. (16CR:5832).
- Marquez threatened Villegas that if he did not confess, he would be put in county jail to be "raped and f****d by a bunch of fat f*****s." (16CR:5832).
- Marquez also threatened to take him to the desert and "beat the ****" out of him if he did not admit to the shooting. (16CR:5832).
- When Villegas maintained his innocence, Marquez slapped him in the back of his head. (16CR:5833).

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[6] Juvenile Investigative Services is a "juvenile processing office" pursuant to Texas Family Code section 52.025(a). (4RR:182).

- Villegas had never been interrogated before and was "terrified out of his mind." (16CR:5833-34).

[*See* Appendix 1, Finding 29; Appendix 2, Finding 29].

Villegas was next handcuffed and taken to the juvenile probation department, where Officer Mario Aguilera documented his intake at 12:26 a.m. and wrote that Villegas had agreed to "give a confession." (13CR:4715-16, 16CR:6227). Villegas was then taken before a magistrate, who was required to warn him of his rights prior to any interrogation. (13CR:4559). But prior to his appearance before the magistrate, Marquez threatened Villegas that if he did not agree to give a statement, he would beat him. Specifically: "You are going to tell the judge that you are going to make a statement and if you don't you already know what I am going to do to you, m**********r. I am going to take you to the desert and beat your ass." (16CR:5836). [*See* Appendix 1, Findings 30-33; Appendix 2, Findings 30-33].

At 12:53 a.m., Villegas did tell the magistrate that he would give a statement, but he did so only because he was "mentally paralyzed" by Marquez's continual threats. (16CR:5835-36). As Villegas explained, "Anything he said at that point I was going to do." (16CR:5835). [*See* Appendix 1, Finding 34; Appendix, Finding 34].

Villegas was then driven back to Juvenile Investigative Services, where he was handcuffed and questioned again by Marquez. (16CR:5837). After being told by Marquez that Williams had already implicated him, Villegas told Marquez the following story while Marquez typed it: On the night of the murder, Villegas and Williams were at the Village Green Apartments, when they were approached by a group of black males with a gun. Williams alone left with the black males, telling Villegas that he was going to do "something crazy." Williams returned later and told Villegas that he had killed Lazo and England. (16CR:5837). [*See* Appendix 1, Finding 35; Appendix 2, Finding 36].

After Villegas finished this story, Marquez took the paper from the typewriter, crumpled it up, and slapped Villegas on the back of the head. (16CR:5837). Marquez threatened Villegas that he would pull the switch on the electric chair himself if Villegas did not confess to being the shooter. (16CR:5837-38). Marquez waved Williams' statement at Villegas and told him that Williams had named "Snoopy" and Gonzalez as accomplices. (16CR:5841). Villegas told Marquez that he did not know anyone named "Snoopy," although he did know someone nicknamed "Droopy." (16CR:5841). Marquez then left the room, but returned shortly thereafter to tell Villegas that Gonzalez had also implicated Villegas as the shooter. (16CR:5843). [*See* Appendix 1, Findings 36-38; Appendix 2, Findings 37-39].

Marquez's physical and psychological coercion, including threats of incarceration and physical harm, left Villegas "mentally drained" and "exhausted" to such an extent that he finally agreed to falsely implicate himself as the shooter, just to get away from Marquez. (16CR:5845-46). Villegas agreed to sign a one-page statement prepared by Marquez. (16CR:5845-56; 19CR:6877-78). Marquez finished typing the statement at 2:26 a.m. on April 22, 1993. (19CR:6876). Villegas was then taken back to the magistrate, where, after receiving *Miranda* warnings, he signed the statement at 2:40 a.m. (19CR:6876-78). [*See* Appendix 1, Findings 39, 40; Appendix 2, Findings 41, 42].

G. While coercing Villegas's false confession, the detectives also collaborated to make Marcos Gonzalez provide a false statement consistent with that confession.

While Marquez was interrogating Villegas, Detective Graves interrogated Gonzalez. The circumstances of this questioning were as follows:

- Graves threatened to beat Gonzalez if he did not confess to the Electric Street shooting. (6CR:1970).
- Graves also threatened to put Gonzalez in jail where he would be "screwed by fat, old men" unless he confessed. (6CR:1970).
- Graves promised Gonzalez that he was only interested in going after Villegas for the killings. (6CR:1957).

- When Gonzalez refused to confess, Graves slammed him against the wall repeatedly. (6CR:1957).

[*See* Appendix 1, Finding 25]. At 1:15 a.m., after hours of denials and intense interrogation, Gonzalez ultimately signed a statement typed by the detectives, despite the fact that he knew it was untrue. (6CR:1952-53, 1972-73, 1976). [*See* Appendix 1, Finding 25].

Marquez took breaks to communicate with Graves during the simultaneous interrogations of Villegas and Gonzalez. (7CR:2034). During these conversations, Graves learned that pertinent details in Villegas's statement conflicted with Gonzalez's first signed statement. (7CR:2033-34). He then obtained a second statement from Gonzalez which was inconsistent with his first statement, but corroborated statements from Villegas's coerced false confession. (7CR:2033-34; 19CR:6718-21, 6877). [*See* Appendix 1, Findings 41-43; Appendix 2, Finding 40]. In particular:

Villegas's statement (19CR:6877)	*Gonzalez's first statement (19CR:6718-19)*	*Gonzalez's second statement (19CR:6720-21)*
Gonzalez was present at the shooting	Gonzalez got out of the car earlier and was not present at the shooting	Gonzalez was present at the shooting
The driver of the car was "Popeye"	The driver of the car was "Snoopy"	The driver of the car was "Popeye"

Villegas's statement (19CR:6877) (cont'd)	*Gonzalez's first statement (19CR:6718-19) (cont'd)*	*Gonzalez's second statement (19CR:6720-21) (cont'd)*
The front passenger was "Droopy"	The front passenger was "Popeye"	The front passenger was "Droopy"

Gonzalez's second statement also included new details regarding what he witnessed during the shooting, which were omitted from his first statement, but consistent with Villegas's signed statement. (19CR:6719-21, 6877). [*See* Appendix 1, Finding 44-46].

As a result of his statements, Gonzalez was arrested and charged with capital murder. (6CR:1971). However, he was never prosecuted. (6CR:1849, 1971). [*See* Appendix 1, Finding 47].

H. Villegas's false confession was not corroborated by any evidence; was inconsistent with other evidence; and had demonstrably false details.

Villegas's coerced statement contained details that are demonstrably false and factually impossible in several respects, and other details conflicted with evidence arising in the investigation. Specifically, Villegas's statement contained the following demonstrably false and factually impossible details:

Villegas's statement (19CR:6877)	*Facts*
"Popeye" was driving	The boy known as "Popeye" was incarcerated at the time of the offense; he therefore could not have been and was not driving the car involved in the shooting. (6CR:1848; 19CR:5426-27).
"Droopy" was a passenger and yelled "Que Vario" to the victims	The boy identified as "Droopy" was under house arrest at the time of the shooting, and his electronic monitor confirmed he did not leave his home; he therefore could not have been and was not in the passenger seat at the time of the murder, nor did he yell "Que Vario" at the victims. (19CR:5426-27).
The boys committed a "beer run" at a Diamond Shamrock before the shooting	No beer was stolen at that Diamond Shamrock on the evening of the shooting; therefore, there was no "beer run" committed by the group of boys. (7CR:2287-90; 19CR:5468).

[*See* Appendix 1, Finding 48; Appendix 2, Finding 43]. Villegas's coerced statement also contained details that conflict with other evidence developed in the investigation:

Villegas's statement (19CR:6877)	*Other evidence*
The color of the car involved was white.	Surviving victim Hernandez: the car was maroon or red. (17CR:6244) Surviving victim Medina: the car was goldish. (19CR:6708). Rangel's statement documenting Villegas's "creative story" to him: the car was black. (17CR:6248) Gonzalez's first statement: the car was beige. (19CR:6718).

Villegas's statement (19CR:6877) (cont'd)	*Other evidence (cont'd)*
The (nonexistent) beer run occurred at Diamond Shamrock at Dyer near the Village Two Apartments.	Gonzalez's first statement: the beer run occurred at 7-Eleven at Hondo Pass and Railroad. (19CR:6719).
Upon seeing the victims, Droopy yelled from the car, "Que Vario."	Surviving victim Hernandez: Someone from the car yelled "Que Putos." (17CR:6244). Surviving victim Medina: Someone from the car yelled "come here." (19CR:6709) Williams' statement: Popeye, not Droopy, yelled "Que Barrio." (17CR:6251) Gonzalez's statement: Villegas, not Droopy or Popeye, yelled "VNE Putos." (19CR:6719)
After the initial gunshots from the car, the perpetrators chased after Lazo, "finishing him off" while he was running away toward the home of the Gorhams.	No additional shell casings were recovered beyond the six found together on Electric Street. (15CR:5387). Neither the Gorhams, Hernandez, nor Medina reported seeing or hearing a new set of gunshots after the initial five or six shots. (9CR:2907-08; 15CR:5488; 17CR:6244; 18CR:6610; 19CR:6709, 6726, 6736). Lazo had no entrance wounds to the back, suggesting he was not shot again, or "finished off," while running away. (15CR:5401-06, 5488; 18CR:6615-16, 6631).

[*See* Appendix 1, Finding 51; Appendix 2, Finding 43].

Surviving victim Hernandez did not see Villegas's statement before Villegas was convicted; when he reviewed it later, Hernandez recognized that Villegas's statement does not describe the events he witnessed that night. (14CR:4818-19, 19CR:6727). Surviving victim Medina agrees. (19CR:6740). Even Detective Marquez admits that portions of Villegas's statement were wrong and did not make sense. (15CR:5482). Indeed, Detective Arbogast is not aware of any evidence corroborating any part of Villegas's statement. (4RR:152).

I. Villegas retracted his false confession as soon as he was away from Marquez's influence.

As soon as he was away from Marquez, Villegas recanted his statement to Monica Sotelo, a juvenile probation officer. (19CR:6696). Sotelo met with Villegas a few hours after Marquez delivered him to the juvenile probation department. (4RR:35-36). Sotelo noted that Villegas was shaking and looked scared. (4RR:37; 19CR:6696). According to Sotelo, Villegas did not realize or barely realized at the time that his statement made him out to be the shooter. (4RR:38). He informed Sotelo that "he didn't do it," and that he was not in the area where the crime occurred that night. (4RR:38; 19CR:6696). He told her that he only confessed because "the cops kept harassing him." (19CR:6696). He told her that he was "tired and [he] wanted to go back to sleep, so [he] told them what they wanted to hear." (4RR:38-39;

19CR:6696). [*See* Appendix 1, Finding 52; Appendix 2, Findings 47, 48]. According to Dr. Leo, that this recantation was consistent with the time frame within which persons who falsely confess typically recant. (15CR:5669-71).

Dr. Leo testified that there were a number of "earmarks, red flags, giveaways of potential problems" in the case that should have led Villegas's attorney to call an expert on false confessions as a witness. (15CR:5645-46). In a bill of exceptions, he testified to a number of specific facts in this particular case that are consistent with false confessions, and increased the risk of a false confession. (15CR:5679-94). The district court found Villegas's statement involuntary, and has ordered it suppressed. (22CR:7683-98; Appendix 2, Conclusions 4, 5, 11, 12(a), 12(b)). Appellant's brief takes pains to assert that its failure to appeal this ruling does not mean it agrees with it. It omits to mention that it did not even call Marquez, the detective who coerced the statement, as a witness to testify at the suppression hearing. (4RR:1-267; 5RR:1-53; Appendix 2, Finding 57). Unfortunately, the false confession led to Villegas being prosecuted and convicted of homicide, and spending almost two decades behind bars.

J. The first trial, resulting in a hung jury.

Villegas's first trial for capital murder began on December 5, 1994. (5CR:1505). The State was represented by district attorney Jamie Esparza as lead

trial counsel, and by John Williams as co-counsel. (5CR:1506). Villegas was represented by retained counsel Jaime Olivas. (5CR:1506). During the defense case, Olivas put on eighteen witnesses to support (1) an alibi defense; (2) that the signed statements were made as a result of police intimidation and illegal and coercive interrogation tactics used on the particularly vulnerable Villegas and Williams; and (3) that the signed statements were entirely unreliable because they included demonstrably false details and conflicted with other evidence. (5CR:1511-14; 7CR:2089-2401). [*See* Appendix 1, Finding 66].

The evidence and arguments concluded on December 12, 1994. The jury was deadlocked, because the defense case created legitimate disagreements between the jurors as to whether the State had proven its case beyond a reasonable doubt.[7] (19CR:6760). The trial court declared a mistrial on December 14, 1994. (1CR:95). [*See* Appendix 1, Finding 74].

K. The State concealed or destroyed exculpatory evidence after the first trial.

The crime was investigated by a private investigator, Tony Kosturakis. (19CR:6836). He conducted witness interviews regarding the crime in November or

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[7] Appellant's brief characterizes the mistrial as a "freak" mistrial. (A'nt brf. p. 4). As support, it cites only to a statement from attorney John Gates, who was not present and did not represent Villegas until he was appointed later, for the second trial. Olivas personally interviewed jurors after the mistrial. (19CR:6760). He disagrees with Gates' statement and characterization of the mistrial. (19CR:6760).

December of 1994, and audiotaped the interviews. (19CR:6836; 14CR:5249). Unfortunately, Kosturakis is no longer able to remember the identity of the witnesses or other fine details of his investigation, due to the passage of so many years. (19CR:6836). However, he does recall that the tape recording identified the person who actually shot Lazo and England, as well as the location of the murder weapon. (19CR:6836). [*See* Appendix 1, Findings 56, 130, Conclusion p. 49].

According to Kosturakis, a witness told him that the murder weapon could be found at a particular house on Shenandoah Street, in a certain room, in the closet above the ceiling, in a shoe box. (19CR:6836). This recollection is consistent with Martinez-Serrano's description of going to the Flores home and being shown the murder weapon by Sally Flores, a sister of Rudy and Javier. (14CR:5221-25, 5232-33). Kosturakis found the witness credible. (19CR:6836).

According to Martinez-Serrano, she also directed Kosturakis to other people who would have known who the actual killer was. (14CR:5250). The district attorney reported to the court after closing arguments in the first trial that Kosturakis had contacted him about "a tape recorded conversation of Koni (phn.) [*sic*] Martinez[.]" (20CR:7150). The district attorney told the court after the first trial that Kosturakis had information that besides Martinez, a "Sally" and "one other person" also had evidence of Villegas's innocence. (20CR:7150).

The district attorney told the trial court that the tape recording blamed the Flores brothers. (20CR:7150). He claimed this information was relayed to Lt. Saucedo, head of Crimes Against Persons, and that "they" investigated the matter. (20CR:7150). He went on to discount the importance of the tape recording by representing to the court that the El Paso Police Department had investigated and it was "pretty well documented" that Javier Flores was not there. (20CR:7150, 7152). Of course, this representation ignores the evidence that Rudy Flores's statement placed him at the scene of the crime, at the exact time the shooting occurred; and ignores the evidence that the Flores brothers were violent, had previous altercations with Lazo, and had even threatened to kill him. (14CR:5104; 17CR:6253; 19CR:6644-47).

Marquez came to Kosturakis's office to listen to the tape. (19CR:6836). Marquez admitted during Villegas's second trial that he recalls listening to the tape recording. (4CR:1063). But, like Kosturakis, he also no longer recalls the contents of the tape recording. (15CR:5516). Marquez testified that Lieutenant Saucedo and Detective Ruiz listened to the tape recording with him. (15CR:5515). Both Saucedo and Ruiz deny this testimony. (14CR:4769, 4772; 16CR:5742-43). As a commander, Saucedo was an administrator; it was not his job to be directly involved in an investigation, and it would have been unusual for him to go with a detective to listen

to a tape recording. (15CR:5517, 16CR:5743). [*See* Appendix 1, Findings 56, 125(f), Conclusion p. 43].

According to Kosturakis, he turned the tape recording over to Marquez. (19CR:6836). He assumed it would be in evidence. (19CR:6836). Marquez testified at the second trial he "did not recall" whether or not he picked up the tape recording, but he "would venture to say" that Kosturakis did give it to him. (4CR:1062). He testified at that time he did not know what happened to it. (4CR:1063). Sixteen years later, at the writ hearing, he variously denied taking the tape and stated he did not remember. (15CR:5514, 5516, 5518-19).

During the pretrial phase of Villegas's second trial, the issue of *Brady* disclosures was raised. The district attorney once again asserted that he called Lieutenant Saucedo regarding the information provided by Kosturakis, and that "he tracked it down." (3CR:559). Villegas's attorney at the second trial, John Gates, specifically requested to inspect any "documents or tapes or video tapes" submitted by Kosturakis to the State. (3CR:559). The district attorney stated that he never received any "documents" from Kosturakis. (3CR:559). He promised to check with police officers about what the State received. (3CR:559-60). He then claimed "the only thing the State received" relating to Kosturakis was a telephone message, and

he would check the file to see "if I still have it," raising the question of why the State would not "still have" any potentially exculpatory materials at all. (3CR:560).

The district attorney's representation that the "only thing the State received" was a telephone message – in response to Gates's specific request for any tapes – is inconsistent with Kosturakis's testimony that Marquez took the tape recording after listening to it, with Marquez's admission that he did listen to the tape recording, and with Marquez's testimony that he would "venture to say" he did take it. (19CR:6836, 4CR:1062-63). Gates never received the tape. (18CR:6264). [*See* Appendix 1, Finding 56].

L. The second trial, resulting in a conviction.

Villegas's second trial began on August 21, 1995. (9CR:2734). The State was again represented by district attorney Esparza. (9CR:2735). Villegas' family could not afford to continue to retain Olivas to represent him. (19CR:6760). Olivas volunteered to continue representing Villegas as appointed counsel. (19CR:6760). The judge decided not to appoint him. (19CR:6760). [*See* Appendix 1, Finding 75].

Instead, the court appointed John Gates to represent Villegas at the second trial (18CR:6262). Gates was appointed a mere sixty-seven days prior to the start of trial. (18CR:6262). Olivas offered to act as a resource for Gates's preparation, but Gates never contacted him. (19CR:6761). Instead, Gates used the five volumes of

transcripts from Villegas's first trial as the primary source of his preparation. (18CR:6262). He did not receive these transcripts until eight days after being appointed, or fifty-nine days before trial. (18CR:6262). John Williams, an experienced criminal defense attorney who served as second-chair counsel for the State in Villegas' first trial, testified that 60 days was not sufficient time to prepare for that case, and that he could not be effective in that period of time. (14CR:5198-99). [*See* Appendix 1, Findings 75, 123].

Gates later admitted by affidavit that he overlooked or did not utilize substantial amounts of "vital, material, and relevant" evidence. (18CR:6262-65). Gates further admitted that he missed several key issues and that Villegas's case required much more preparation than he did or had time to do. (18CR:6262). He admitted that had he not made these errors and omissions, "there would have been no plausible reason not to utilize this evidence for Mr. Villegas's second trial." (18CR:6262). His "trial strategy would have been different and more effective," and he believed "the outcome may have been different." (18CR:6262). [*See* Appendix 1, Finding 127, 128].

Additionally, at the second trial, the district attorney convinced Gates to enter a stipulation that was inconsistent with the medical evidence. (18CR:6265, 6612). Lazo was shot twice. (5CR:1711; 18CR:6615-16, 6631). The medical examiner's

autopsy report and the autopsy checklist establish that Lazo sustained a single bullet wound to the front mid-section of his abdomen, near the umbilicus; and that a second bullet entered the front inner portion of Lazo's thigh and exited from the rear portion of his leg. (18CR:6615-16, 6631). At the first trial, Dr. Nadjem, who performed the autopsy, testified that Lazo had one bullet wound to the abdomen, and a second bullet wound to the back of the left thigh. (5CR:1711). Lazo died because of the abdominal gunshot wound. (5CR:1715). [*See* Appendix 1, Finding 78(c), Conclusions p. 75].

The placement of the bullet wounds was significant, because it is inconsistent with Villegas's coerced false confession. In that statement, Villegas stated that Lazo was running away and that he chased him down and shot him, inferring that Lazo was shot in the back. (19CR:6877). In order to avoid the inconsistency, at the second trial, the district attorney convinced Gates to sign a stipulation that Lazo "died as the result of two (2) bullet wounds to the stomach area and suffered a third bullet wound to the left thigh." (18CR:6265, 6612). [*See* Appendix 1, Finding 127, Conclusions p. 66, 75].

The district attorney knew that the stipulation was false: he told the jury in the first trial that Lazo was shot twice.[8] (20CR:7119). Gates admits that he erred in entering the stipulation to the autopsy report. (18CR:6265). Besides the fact that it was wrong, it cost him the important opportunity to highlight that Lazo was not shot in the back, contradicting the suggestion in Villegas's signed statement that he was shot while running away, and making the confession factually impossible. (18CR:6265). [*See* Appendix 1, Finding 127, Conclusions p. 66]. The only possible explanation for Gates's agreement to the false stipulation lies in the fact that this Court later found his representation of Villegas ineffective. *Ex parte Villegas*, 415 S.W.3d 885 (Tex.Crim.App. 2013). However, there is no justification for the district attorney inducing Gates to sign the false stipulation.

The district attorney then relied on this false stipulation and emphasized it to the jury. Specifically, Gates argued in closing that Villegas did not intend to murder Lazo. To rebut this argument, the district attorney argued that one who "put three bullets in one person . . . certainly intended to kill that person." (10CR:3406). He argued,

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[8] The district attorney told the jury in the first trial that Lazo was shot once in the abdomen, and once more in the "back of the body." (20CR:7119). The medical evidence establishes that this reference to Lazo being shot in the "back of the body" is also false. (18CR:6615-16, 6631).

> I think plain and simple bottom line, this is the answer. I point a gun at you. I intend to kill you. I fire at you. I certainly intend to kill you and **I put three bullets in one person. I think I intended to kill that person**. I think so.

(10CR:3406). The district attorney knew that Villegas did not "put three bullets" in Lazo, but presented and relied on the false stipulation to make the facts appear more consistent with the coerced false confession, to argue Villegas's intent, and to secure a conviction regardless of the truth.

According to the presiding juror from the second trial, the defense "did not present much of a case" and there was "nothing presented to say this young man was innocent or to create any reasonable doubt." (19CR:6843). Based on what he learned during the evidentiary hearing of Villegas's application for a writ of habeas corpus, the presiding juror believed that Gates was "totally ineffective." (19CR:6843).

The second trial concluded on August 24, 1995, with the jury finding Villegas guilty of capital murder. (10CR:3414). But based on what he knows now, there is "no way" the presiding juror would have voted to find Villegas guilty. (19CR:6843). [*See* Appendix 1, Conclusions p. 41]. Villegas was convicted specifically because of his coerced false confession. (19CR:6843). He was sentenced to spend the rest of his life in prison. (10CR:3416).

M. John Mimbela.

In 2007, John Mimbela learned about Villegas's case, when he married into the family and adopted Villegas's nieces. (19CR:6839). Although he was initially skeptical of his parents' belief that Villegas was innocent, Mimbela looked into the case. (19CR:6839). After reviewing the records and learning about false confessions, Mimbela came to believe that Marquez did not properly investigate and ignored the right suspects. (19CR:6839).

Mimbela became convinced that Villegas was wrongfully convicted, did not receive a fair trial, and is innocent. (19CR:6839; 16CR:5963, 5972). Mimbela presented his findings to district attorney Jaime Esparza. (19CR:6839). Esparza advised Mimbela to hire a good lawyer. (19CR:6839; 16CR:5979). However, he confessed to Mimbela that the district attorney's office now finds Marquez to be so lacking in credibility that it no longer uses him on the stand. (19CR:6839; 16CR:5979).

Many of the recordings at issue in this appeal are of Mimbela talking to Villegas, particularly about witnesses in the case.[9] In fact, Mimbela has talked to

[9] Appellee assumes *arguendo*, without conceding, that Appellant has accurately transcribed the recordings at issue in its brief to the Court of Appeals, except for the recording designated by Appellant as number 2B. The Court of Appeals likewise relied on Appellant's transcripts in its opinion, without finding whether those transcripts are accurate. *Villegas*, 506 S.W.3d at 740 n. 12.

anyone who would listen about the case, including witnesses. (19CR:6839). He shared with those witnesses information that he learned, to see if they agreed with his conclusion. (16CR:5972-74).

Contrary to Appellant's brief, however, the record does not support claims that Mimbela acted as Villegas's agent, that he conspired with Villegas, nor that he sought to have witnesses testify falsely. The record does not support Appellant's broad claim that the recordings "confirm" that "something untoward was going on." And the record certainly does not support Appellant's accusations that Mimbela offered financial benefits to witnesses to influence their testimony, manufacture evidence, or suppress unfavorable evidence; nor that there was any conspiracy to do so. It is significant that the paragraph of Appellant's Statement of "Facts" making these accusations contains only a single citation to the record – and this citation is only to an argument by an assistant district attorney, not any evidence of wrongdoing. (A'nt brf. pp. 5-6). In response to the cited argument, the trial court immediately recognized, "Nothing you have told me rises to the level of any impropriety on behalf of this individual." (16CR:5948). Appellant's conspiracy theory is invented out of whole cloth.

Shortly after the argument cited in Appellant's brief, it made a bill of exceptions to explore its accusation that Mimbela was exercising his "First

Amendment right" to spend money publicizing the case, "in a way that is specifically calculated to influence this court and this court's decision." (16CR:5947, 5954-83). In that bill of exceptions, Appellant examined Mimbela at length regarding his conversations with witnesses and his acts to garner publicity for the purpose of obtaining truthful witness testimony. (16CR:5954-83). Nothing in that testimony suggests any improper conduct by Mimbela. (16CR:5954-83). Mimbela never harassed or pressured anybody into giving false or unwilling testimony. (19CR:6839). Appellant's brief in the Court of Appeals admitted that it uncovered no evidence of wrongdoing. (Appellant's brief in the Court of Appeals [herein, "A'nt COA brf."] p. 29). Its accusations are unsupported and unwarranted.

N. Proceedings on the habeas corpus application.

On December 23, 2009, Villegas filed an application for writ of habeas corpus based on ineffective assistance of counsel. (4CR:1227). In his amended application, he added actual innocence as a basis for relief. (11CR:3612-13; 12CR:4117-39).

The trial court heard extensive evidence and received numerous exhibits. (13CR:4505-19CR:6988). As the evidentiary hearing progressed, and it became clear that Villegas had been wrongfully convicted, it also became clear that Appellant would undertake any effort to uphold the conviction, regardless of Villegas' innocence, including:

1. The district attorney took actions to prevent Rudy Flores from providing testimony that would support the writ application.

The district attorney undertook measures to prevent Rudy Flores from offering testimony that might support Villegas by corroborating his own previous statement placing him at the scene of the crime, at the time of the shooting. At the date of the writ hearing, Rudy was incarcerated because of a different conviction, and he was brought to the El Paso County Jail on a bench warrant. (11CR:3953). Attorney Joe Vasquez had previously represented Rudy. (16CR:5767). Rudy's family asked Vasquez to contact him regarding why he was brought to El Paso. (16CR:5763). Vasquez went to the jail to interview Rudy. (16CR:5763). There, law enforcement officers barred Vasquez from seeing his own client. (16CR:5763). They informed him that "they needed to contact the district attorney's office and get clearance from them before [Vasquez] would be allowed to visit with Mr. Flores," his client. (16CR:5763).

This interference with Rudy's right to counsel was brought to the trial court's attention, after which Vasquez was allowed to speak with Rudy. (16CR:5764, 5768-69). But instead of allowing Vasquez to speak with Rudy at the jail, the office of the district attorney had him taken out of the jail, and brought to its own offices to meet with his attorney. (16CR:5764). In his years of representing criminal defendants,

Vasquez had never had the district attorney take a client to his office and tell him that he could interview the client there. (16CR:5775).

The district attorney then interviewed Rudy in the presence of Vasquez for some period of time. (16CR:5770). The district attorney did not inform Rudy of his *Miranda* rights before interviewing him. (16CR:5786).

Rudy was adamant that he did not want to testify. (16CR:5772, 5786). Vasquez was concerned that Rudy could waive his Fifth Amendment privilege by testifying. (16CR:5765). The district attorney convinced Rudy to sign an affidavit, which it later offered into evidence, denying his involvement in the shooting and the testimony related to him. (16CR:5765-66, 5771-72, 5808-09). Vasquez testified that the district attorney secured this affidavit by promising Rudy that if his Fifth Amendment privilege became an issue, it would not use or would withdraw the affidavit. (16CR:5765, 5774-75).

The office of the district attorney's actions in obtaining the affidavit caused the trial court to find that Rudy had waived his Fifth Amendment privilege. (16CR:5794). Consequently, when Rudy attempted to invoke the privilege and refused to testify about the events, he was held in contempt of court. (16CR:5802-05). The office of the district attorney was then permitted to offer the testimony it wished to obtain from Rudy, in the form of the affidavit procured by making promises to Rudy; while Villegas

was not able to cross-examine or obtain testimony from him about the same events. (16CR:5808-09). [*See* Appendix 1, Finding 131].

Appellant's interference with Rudy's ability to consult with his own attorney remains unexplained. Its unusual step of bringing Rudy to its office to meet with the assistant district attorney and his own attorney simultaneously and to sign an affidavit likewise remains unexplained. But the result of this course of conduct was to allow Appellant to present the evidence it desired from Rudy, in an affidavit it drafted itself, while preventing Villegas from having the right to cross-examine him about that affidavit or his statement to the police, or present any other testimony from Rudy.

2. The district attorney proffered an incorrect affidavit claiming that Villegas made a jailhouse confession.

Appellant also decided to take the position that Villegas made a jailhouse confession to the offense, a strategy it continues in this appeal. It obtained an affidavit from Onnie Kirk, who has an extensive criminal history. (19CR:6861, 6868-70; *See* Appendix 1, Finding 117). In his affidavit, Kirk claimed that he was incarcerated with Villegas at the El Paso County Jail in 1994, and Villegas admitted to shooting two people. (19CR:6861). Kirk's affidavit is demonstrably false: Villegas was released on bond in September 1993. (19CR:6866, 6867). He remained released on bond during the entire calendar year of 1994, until his conviction in 1995. Appellant's claim

that Villegas made some kind of admission to Kirk while they were incarcerated together in 1994 therefore cannot possibly be true.

3. The district attorney proffered an incorrect transcript of a recorded conversation to falsely claim Villegas stated he was not innocent.

Consistent with offering Kirk's affidavit to support its jailhouse-confession theory, Appellant took the position that Villegas confessed to his mother, in one of the recordings still at issue in this appeal. In that conversation, Villegas told his mother about his prayers to God. (19R:6973). Appellant argued and presented to the trial court a purported transcript, claiming that Villegas stated, "Please God, let me get out of here -- even though I'm not innocent, woo, woo, woo, woo, woo." (16CR:6138, 19CR:6973). In fact, what Villegas said was, "Please God, let me get out of here -- **even though I'm not here to tell you** whoo, whoo, whoo." (19CR:6853). Yet Appellant continues to incorrectly describe this statement in this appeal, even mischaracterizing it as an "admission of guilt."

In response to Appellant's arguments, Villegas requested all of his recorded conversations. (12CR:4042). The trial court ordered the El Paso County Sheriff to produce them. (12CR:4046). The Sheriff did not object; but Appellant filed a petition for writ of mandamus with this Court to attempt to avoid providing the recordings to Villegas. This Court denied leave to file its mandamus petition. *In re State ex rel.*

Esparza, No. WR-76,817-01 (Tex.Crim.App. Apr. 18, 2012) (denied without written order). Villegas subsequently provided the trial court with a correct transcript and the actual recording of the conversation, and encouraged the trial court to listen to it. (17CR:6204-05, 19CR:6845-60). Unsurprisingly, the trial court found Villegas's actual statement irrelevant. [Appendix 1, Finding 133].

After hearing all of the evidence, the trial court recommended that habeas relief be granted on the grounds of ineffective assistance of counsel and actual innocence. (13CR:4378-4455, see Appendix 1 pp. 77-78). In 2013, 18 years after his conviction, this Court granted the writ of habeas corpus based on ineffective assistance of counsel. *Ex parte Villegas*, 415 S.W.3d 885 (Tex.Crim.App. 2013); 21CR:7515.

O. After Appellant produced hundreds of hours of recorded conversations in advance of the retrial, the trial court conducted a pretrial hearing on their admissibility.

This appeal arises from the trial court's exclusion of recorded jailhouse conversations in advance of the third trial of Daniel Villegas for a crime he did not commit. After the conclusion of the habeas corpus proceeding, Appellant produced additional recordings of thousands of conversations, constituting approximately 1400 hours of recordings of Villegas speaking with various people while he was in custody. (3RR:5-6). The trial court asked Appellant to confer with Villegas's counsel about which recordings were relevant, and to determine whether there was a disagreement

about their contents. (3RR:6-7). Appellant's counsel stated to Villegas's attorney that all of the hundreds of hours of recordings it had produced to that date were relevant. (3RR:7).

Recognizing the futility of attempting to listen to hundreds of hours of audio recordings outside of the jury's presence during trial to determine their admissibility, the trial court instructed Appellant to identify the particular recordings it wishes to offer at trial, and conducted a pretrial hearing on their admissibility. (21CR:7559; 9RR:1-98). Appellant identified 39 recordings it wishes to play to the jury at trial. (22CR:7700). It stated to the trial court that it wanted to play one- to three-minute segments of these recordings. (9RR:17-18). Villegas filed a motion for *in camera* review, and the judge listened to the recordings at issue in their entirety, in advance of the hearing. (22CR:7706; 9RR:5).

The trial court conducted a hearing on the admissibility of the recordings. (9RR:1-98). No evidence was offered apart from the contents of the recordings themselves. (9RR:1-98). The trial court ruled that the recordings at issue in this appeal would be excluded because they constituted hearsay, were irrelevant, and/or any probative value was outweighed by their prejudicial effect or other considerations under Texas Rule of Evidence 403. (9RR:24, 37, 46, 53, 66, 72, 78, 89, 94).

P. Content of the recordings

There are 37 recordings at issue in this appeal. This brief assumes *arguendo*, without conceding, that Appellant's brief in the Court of Appeals accurately transcribed the recordings, except for the one designated by Appellant as number 2B.[10],[11] Appellant's claim that Villegas stated he was "not innocent" in the recording designated 2B is false.

1. Villegas never stated he was "not innocent," and did not make any other statements from which guilt could reasonably be inferred.

Appellant claims that Villegas made an "admission of guilt." In particular, Appellant claims that in a recording of October 12, 2011, Villegas stated, "Please, God let me get out of here so – ***even though I'm not innocent***, woo, woo, woo, woo, woo ...." (A'nt brf. p. 6, emphasis added). This is not what he said.

In the recording at issue, Villegas explained to his mother:

> I've been saying the same prayer for 17 years. I'm tired. I'm tired of that same prayer. It's not even like I'm praying no more. It's like I'm doing remote control. ... That's the same prayer I've been doing forever, man. That same prayer, when I pray, I don't even feel it anymore. It's like, Oh, my God, something else, same ol', same old day, you know?

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[10] The letter-and-number designations of the recordings correspond to the designation of the issues presented by Appellant in the Court of Appeals.

[11] The Court of Appeals also relied on Appellant's transcripts, without finding that they were correct. *Villegas*, 506 S.W.3d at 740 n. 12.

> After you do something for so long, Mom, I don't care how much you think you can do it. You can't do it. It's just too much. You can do it, but you don't do it with emotion anymore. It's like, Oh, well, whatever. Please, God, let me get out of here -- ***even though I'm not here to tell you*** whoo, whoo, whoo. It's the same thing, the same prayer.
>
> Then you try to switch it, make it a little different, but you're asking for the same thing. You just get void of emotion already because you're already sick of it, you know? You can't do that no more, man. I've been doing that for 17 years. As much as I try to do it, I can't do it, and it's not with emotion no more. It's like I'm just pushing rewind.

(19CR:6853, October 12, 2011 recording at 16:36-17:39, emphasis added). In the same conversation, Villegas expressed his wish that "they hurry up and give me justice," an odd desire if, as Appellant claims, Villegas in the same conversation made an admission of guilt. (19CR:6852, October 12, 2011 at 16:13-16:19).

Appellant also mischaracterizes or removes from contexts statements in other recordings to claim that Villegas somehow confessed guilt. The recording designated 2A refers to "actual innocence" grounds for habeas relief, not whether Villegas was actually innocent or guilty of the crime with which he is charged. Although Appellant omits relevant context to support its misinterpretation, in that conversation, Villegas and his mother discussed meeting with a lawyer. (19CR:6925; March 14, 2011 at 43:57-44:26). Villegas informed her of his belief that the habeas application was his only chance; he explained that he could seek federal habeas relief if he was not successful, but he believed that one would have to establish "actual innocence" in that

context. (*Id*.). He stated "we don't got that;" at the date of this conversation, he had not yet filed the amended writ application, raising actual innocence based on newly-discovered evidence as a basis for habeas relief. (*Id*.; *See* 4CR:1227 [original application]; 11CR:3607 [first amended application]). Almost immediately after these remarks in the same conversation, but in a statement omitted from Appellant's briefing and from the partial transcript it provided, Villegas recognized that "if you look at the evidence, they shouldn't have even, never even convicted me." (March 14, 2011 at 44:42-44:46).

At a hearing on his habeas corpus application on November 10, 2011, the assistant district attorney read from Appellant's version of the recordings it designates as 2A and 2B. (16CR:6089, 6138). In the recordings it designates as 2C, 2D and 2E, on November 10, 22, and 27, Villegas – having no idea that the State of Texas would have created a false transcript to claim he said something he did not say – tried to understand what he could have meant by the expression "not innocent." (See 9RR:85-87). He recognized that Appellant had "twisted" his words, "misconstrued" them, and "flipped" them to make its own meaning. (A'nt COA brf. p. 68, 70). Villegas and Mimbela separately recognized that in the context of a person's prayers, one stating that

he was "not innocent" did not refer to the homicide at issue or any other particular crime.[12] (A'nt COA brf. p. 68-70).

Appellant goes so far as attempting to interpret an offhand comment in the recording designated 2F – repeating a statement to another inmate that "you wouldn't be in here if you didn't do something" – as an admission that Villegas committed murder. (A'nt COA brf. p. 70). Appellant's characterization of these recordings as permitting an inference of guilt is a stretch, to put it mildly.

2. Discussions of witnesses while investigating and preparing for the habeas corpus hearings.

The recordings designated by Appellant as 3 through 8 all involve discussions of witnesses or potential witnesses, recorded while Villegas was preparing for and pursuing habeas corpus relief. It is hardly surprising that a defendant in these circumstances would have conversations about witnesses and their possible testimony. The recordings generally demonstrate Villegas's or Mimbela's search for information, desire for witnesses to tell the truth, and hope to find evidence that will locate the person who actually perpetrated the crime. However, Appellant misconstrues them to argue that Villegas desired those witnesses to testify untruthfully, and even to argue

[12] Mimbela's statements were also properly excluded as hearsay.

that he offered them benefits in exchange for false testimony. Nothing in the record supports these accusations.

- ***Wayne Williams***

Appellant asserts that its recordings designated 3A through 3F refer to Wayne Williams. (A'nt brf. p. 8). They reflect nothing more than Mimbela's attempt to obtain information from a potential witness, Mimbela's repetition of a person's unrecorded out-of-court statements about what he claimed Villegas stated, and Villegas's denial of those statements:

The recordings designated 3A and 3B are ambiguous, and do not even clearly refer to Wayne Williams, but indicate that Mimbela is trying to find someone who informed Villegas that Rudy Flores was responsible for these murders. (A'nt COA brf. p. 86-88).

In recording 3C, Mimbela reports what Wayne Williams purportedly stated to Mimbela in an unrecorded out-of-court statement – that Villegas was "kind of bragging" that he had done it; Villegas told Mimbela that Wayne Williams was lying. (A'nt COA brf. p. 88-89). In recording 3D, Mimbela stated that he was offering Wayne Williams a job so he would be close, hoping he could get information from him. (A'nt COA brf. p. 89). Although Appellant's brief omits this context, in the same

conversation, Mimbela expressed his hope to find the real killer. (9RR:14, 34; July 27, 2009[13] at 6:22-6:41).

In recording 3E, Mimbela reported more about what Wayne Williams purportedly said in the unrecorded out-of-court statement, including that Villegas told him he committed the shooting with a shotgun. (A'nt COA brf. p. 89-91). Of course, the crime was not committed with a shotgun. Villegas again denied making this statement to Wayne Williams, and stated that he was lying. (*Id.*). Mimbela noted that this was the same as Villegas's "creative story" to Rangel, even though it is established that the victims were not killed with a shotgun, and the two mused that Villegas might have told Wayne Williams what he said to Rangel. (*Id.*; *see* 14CR:4887-89). In recording 3F, Mimbela reiterated the same unrecorded out-of-court story from Wayne Williams, and Villegas reiterated that he was lying. (A'nt COA brf. p. 91-92).

- ***Jesse Hernandez and Juan Medina***

The recordings designated 4A through 4E relate to the surviving victims of the shooting, Hernandez and Medina. Mimbela has testified that he discussed Villegas's case with anyone who would listen, including witnesses. (19CR:6839). Some of them

[13] The Supplemental Clerk's record includes more than one recording dated July 27, 2009. The referenced conversation began at 20:27:58 (8:27 p.m.).

refer to sporting events, but there is no doubt on the record that Mimbela is a generous person; he bought 150 tickets to a football game for employees. (9RR:26).

In 4A, Mimbela stated that he had hired Medina. (A'nt COA brf. p. 109). Although Appellant's brief omits this context, in the same conversation, Mimbela expressed his hope to find the real killer. (9RR:14, 34, July 27, 2009[14] at 6:22-6:41).

In 4B, Mimbela stated that he had given Hernandez tickets to the Sun Bowl. (A'nt COA brf. p. 109-10). In 4C, Mimbela stated that Medina had been helping; and (after a portion of the conversation omitted from the transcript) that he had been helping Medina. (A'nt COA brf. p. 110). In 4D, Mimbela informed Villegas that he had given Hernandez and/or Medina tickets to a boxing match; that Hernandez had thanked Mimbela for "everything you're bringing out" because "I didn't want to continue to live this lie;" and Mimbela reassured Hernandez that he was not trying to "buy his vote." (A'nt COA brf. p. 110-11). In 4E, Mimbela told Villegas about taking Hernandez and Rocio to a boxing match; and Mimbela reported that "they" said they would "stay with this" until Villegas is out of prison. (A'nt COA brf. p. 111-12). This last conversation apparently occurred in connection with the report about this case that was later broadcast on NBC Dateline. (9RR:29-30).

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[14] This is another excerpt from the same recording as the one designated 3D, which began at 20:27:58 (8:27 p.m.) on July 27, 2009.

Despite Appellant's characterization, there is nothing in these recordings to suggest that Mimbela offered any benefits to Hernandez or Medina in exchange for any *quid pro quo* – much less that he attempted to improperly influence their testimony, or that he manufactured or suppressed evidence, or that he conspired to do so.

- ***Rudy Flores***

Appellant's recordings designated 5A through 5G relate to Rudy Flores. Mimbela had offered a reward for testimony that helps to bring the real killer to justice. Appellant agreed in the trial court that there is nothing wrong with the offer of a reward for truthful testimony. (9RR:49). In the recordings at issue, Villegas discussed making sure Rudy was aware of the reward, and hopes that he would provide information if he knew who was the real killer:

In 5A, Mimbela repeated hearsay that Rudy knows who did it. (A'nt COA brf. p. 118-19). Other recordings presented by Appellant to the trial court reflect Villegas's awareness that Rudy's statement placed him at the scene of the crime. (19CR:6957, 6959). And in yet another recording presented by Appellant to the trial court, Villegas and his mother recognized that Rudy's statement proved that he knew who actually committed the crime. (19CR:6928).

In 5B, Villegas stated, "If he wasn't the triggerman, hopefully he'll come out with it." (A'nt COA brf. p. 119). In 5C, Mimbela expressed his hope that Rudy would

be willing to cut some kind of deal, "In fact, if he does know who did it or if he was involved." Villegas replied, "That sounds good. I just hope he can get [Rudy] to say it." (A'nt COA brf. p. 119-20).

In 5D, Villegas mentioned that his attorney was going to visit Rudy to see if he would be willing to speak. He mentioned, "That would be the best thing because that'll clear my name." (A'nt COA brf. p. 120-21). In a recording dated February 5, 2011 (*i.e.*, between the those designated 5D and 5E), designated by Appellant below but not made a subject of its appeal, Mimbela discussed approaching Rudy to "tell us the truth," and Villegas responded that he was "praying for him, man, that he goes in and 'fesses up." (February 5, 2011[15] at 11:34-12:31).

In 5E, Yolanda and Villegas discussed whether Rudy or Javier Flores was the culprit. Yolanda expressed her belief that it was Rudy, and she did not like the thought of paying him; Villegas responded that somebody, apparently one of the Flores brothers (which one is not clear from the context), "seemed like a big coward" to him. (A'nt COA brf. p. 121). In 5F, Villegas again expressed his hope that Flores would "fess up." (A'nt COA brf. p. 121). In 5G, Yolanda told Villegas that Rudy had refused to meet with his attorney. (A'nt COA brf. p. 122).

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[15] The Supplemental Clerk's record includes more than one recording dated February 5, 2011. The referenced conversation began at 09:26:36 (9:26 a.m.).

Despite the characterizations of Appellant's brief, none of these recordings suggest an attempt to tamper with Rudy's testimony, fabricate evidence, or suppress evidence. They refer only to seeking to obtain Rudy's testimony and hope that he will "come out with it" or "fess up," if in fact he knows the truth. Nothing in them suggests a hope or belief that Rudy will testify falsely in pursuit of the offered reward, and Appellant has offered no evidence to support this accusation. Nothing in them suggests that Villegas believed that Flores was not the shooter. Appellant's speculation that the reward was offered to Rudy in order to obtain false testimony, rather than truthful testimony, is contrary to Appellant's acknowledgment in the trial court that there is nothing wrong with offering a reward. (9RR:49). Contrary to Appellant's accusation, nothing in any of the recordings rationally suggests that the reward was offered to anyone to "pin the murders" on someone. (A'nt brf. p. 11).

- ***Araselly Flores and Jose Juarez***

Appellant's recordings designated 6A through 6C consist of Mimbela telling Villegas about his conversations with Sally Flores, the sister of Rudy and Javier, and her boyfriend, Jose Juarez, about the offer of a reward for information about the shootings, again in hopes of finding the true perpetrator. Appellant agreed below that there is nothing wrong with the offer of a reward for truthful testimony. (9RR:49).

In 6A, Mimbela reiterates telling them that they were trying to find the true culprit, and thinking they need the money, "so if she knows something ... ." (A'nt COA brf. p. 129-30). In 6B, Mimbela describes a second conversation in which he reminded them of the reward, reassuring them that they should not be afraid to speak if they were in the car because whoever was in the car was not prosecuted. (A'nt COA brf. p. 130-31). In 6C, Mimbela told Villegas that he visited Juarez's father, making him aware of the award "if your son knows anything about it." (A'nt COA brf. p. 131-32). Villegas recalled that, based on Rudy's statement, Juarez was supposed to be in the car too, to which Mimbela reacted that they "think he knows something" and "might know who pulled the trigger." (A'nt COA brf. p. 131-32).

Again, contrary to Appellant's accusation, nothing in any of these recordings rationally suggests that the reward was offered to anyone to "pin the murder" on someone, rather than in hopes of obtaining information from a person with knowledge, that would lead to the true perpetrator. (A'nt brf. p. 12; A'nt COA brf. p. 129-31). Nothing in the recordings suggests that the reward was offered for untruthful testimony, nor did Appellant offer any evidence at the hearing to support that accusation. (A'nt COA brf. p. 129-31; 9RR:1-98).

- ***Rodney Williams***

Appellant's recordings designated 7A through 7C refer to Rodney Williams. Appellant attempts to bolster its misinterpretation by characterizing Villegas's emotions during these recordings. (A'nt brf. p. 13). These recordings have nothing at all to do with the prosecution now pending.

In 7A, Villegas makes reference to an unspecified "oath" and the fact that he had been in the penitentiary, and his feeling that he had been forgotten while Williams and Marcos had been out. (A'nt brf. COA p. 137-38). Contrary to Appellant's characterization, there is no statement by Villegas that Williams made an oath "to him." (A'nt brf. p. 13; A'nt COA brf. p. 137-38). Nor is there any reference to any "pact," as claimed by Appellant. (A'nt brf. p. 45 n. 33). The only oath by Williams in the record is the oath he took to tell the truth when testifying. (6CR:1728; 9CR:3091).

In 7B, Yolanda told Villegas that Mimbela had told her in an unrecorded out-of-court statement that he had burned a letter to Williams, and Villegas responded that she did not know the "philosophy of trying to get people from the street to do what you want." (A'nt COA brf. p. 138). Even assuming Yolanda accurately reported an out-of-court statement by Mimbela, there is nothing in the record to indicate the contents of any such letter. In 7C, Mimbela told Villegas that he had taken Williams to a football game, and Williams enjoyed it. (A'nt COA brf. p. 138-39). Nothing in any of these

recordings suggests any *quid pro quo*, any attempt by Mimbela to improperly influence Williams's testimony, or that Villegas conspired with Mimbela in any way.

- ***David Rangel***

Appellant's recordings designated 8A through 8D refer to David Rangel. In two of them, alleged unrecorded out-of-court statements by Rangel are repeated; in the other two, Villegas struggles with his emotions towards Rangel.

In 8A, Mimbela reiterates a purported out-of-court statement by Rangel that people blamed him for the prosecution, that Rangel told "them" what Villegas told him, but "they" threw that away and wrote "whatever they wanted to write, and then they scared me into signing it." (A'nt COA brf. p. 145). In 8B, Villegas repeats what somebody else told him Rangel stated. (A'nt COA brf. p. 146).

In 8C, Villegas suggests forgiveness for Rangel, because "we were all a bunch of kids back then[.]" (A'nt COA brf. p. 146). But in 8D, three years later, he expresses anger with Rangel. (*Id*.). Appellant's brief recognizes that Villegas became a suspect only after Rangel's statement. (A'nt brf. p. 2). It is therefore perfectly consistent with Villegas's innocence for Villegas and his family to blame Rangel for the prosecution, or to be angry with him.

Appellant argues that they rebut a defensive theory because they show that Villegas was not joking or bragging when he told Rangel his "creative story," or that

Rangel did not think so at the time. But nothing in the recordings reflect such an understanding, and Appellant does not explain how any of the words stated in these recordings reflect on whether or not Villegas was joking or bragging in the story he told Rangel, or what Rangel believed. At most, they reflect that Rangel was coerced into giving a false statement in 1993, consistent with his testimony since that time.

3. Discussions of delivering a U.S. Congressman's letter of support to the prior judge, as suggested by another sitting judge.

The recordings designated 9A, 9B and 9C refer to discussions of the prior trial judge in the case, Judge Bramblett. It is unsurprising that a convicted person, having filed a petition for writ of habeas corpus, would have conversations about the judge. Judge Ables characterized this type of conversation as "jailhouse talk" and "gossip." (8RR:27, 35).

While his post-conviction writ was pending, Villegas received a letter of support from former United States Congressman Silvestre Reyes. (8RR:35; 9RR:68). In the recordings at issue, Mimbela discussed trying to make Judge Bramblett aware of Congressman Reyes's letter, without doing anything improper. (A'nt COA brf. 151-53). Appellant turns these statements on their head to argue that they actually show an attempt by Mimbela to improperly influence Judge Bramblett.

Appellant's brief omits important context from the recording designated 9A. In that conversation, Mimbela informed Villegas that another sitting judge, Judge Ricardo Herrera, advised Mimbela to deliver Congressman Reyes's letter to Judge Bramblett, but to do so indirectly. (9RR:72). Judge Herrera explained to Mimbela that federal agents and members of the public often talk to him, to advise him to look closely at particular cases. (February 8, 2010[16] at 6:46-11:31). Judge Ables affirmed in the trial court that he gets letters like that "all the time." (8RR:35). After this conversation with Judge Herrera, a probation officer suggested to Mimbela that Congressman Reyes's letter be delivered to Judge Bramblett's husband. (A'nt COA brf. p. 151). The recording further references Mimbela's desire to avoid doing anything improper. (A'nt COA brf. p. 151).

Recording 9B occurred on February 22, 2010, and indicates that Mimbela was still trying to arrange a meeting. (A'nt COA brf. p. 152). Appellant points out that Judge Bramblett recused herself, and argues – without any support in the record – that she was "forc[ed] to recuse herself" because of *ex parte* communications with Mimbela. (A'nt brf. p. 46). In fact, Judge Bramblett's recusal order states that she recused herself based on some unspecified information that she learned on February 19 – three days

[16] The Supplemental Clerk's record includes more than one recording dated February 8, 2010. The referenced conversation began at 19:50:50 (7:50 p.m.).

before this conversation in which Mimbela was still trying to arrange a meeting. (10CR:3467).

Recording 9C, partially quoted by Appellant, reflects Mimbela's belief that Judge Bramblett "already had her mind set," no matter "how fair she wanted to be[.]" (A'nt COA brf. p. 153). In other recordings, Mimbela discussed his perception that Judge Medrano would be fair and open-minded and wanted to find the truth – statements inconsistent with the State's theory that Mimbela and Villegas conspired to manipulate the system or cover up the truth. In one, Mimbela expressed his satisfaction that the case would be heard by an unbiased judge. (April 5, 2010 at 00:48-3:04). In another, Mimbela informed Villegas of his impression that Judge Medrano wants the truth and justice, and "he's all about the truth," to which Villegas responded, "Thank God." (February 2, 2011[17] at 4:21-4:39). Any person's desire to have a case heard by an open-minded, fair judge who wants to find the truth can not rationally be construed as evidence that he seeks to manipulate the judicial system to avoid a fair trial.

Q. This appeal.

Appellant appealed the trial court's evidentiary rulings. (22CR:7842). Its notice of appeal recites that "The State certifies that jeopardy has not attached in this case, the

[17] The Supplemental Clerk's record includes more than one recording dated February 2, 2011. The referenced conversation began at 16:05:36 (4:05 p.m.).

appeal is not taken for the purpose of delay, and the evidence is of substantial importance in the case." (22CR:7843; Appendix 3). Appellee contends that this notice fails to meet jurisdictional requirements for an interlocutory appeal, which require these certifications to be made by the prosecuting attorney personally, not "The State." On February 25, 2015, the Court of Appeals denied Appellee's motion to dismiss this appeal, reasoning that the prosecutor made these certifications because he is representative of the State. *State v. Villegas*, 460 S.W.3d 168 (Tex.App.–El Paso 2015, order). Appellee respectfully submits that this analysis substitutes a certification made in a representative capacity for a required personal certification, and that appellate jurisdiction is lacking.

Finding that the trial court did not abuse its discretion in the exclusionary order at issue, the Court of Appeals affirmed. *State v. Villegas*, 506 S.W.3d 717 (Tex.App.–El Paso 2017, pet. granted). This Court granted Appellant's petition for discretionary review. Upon review, the appeal should be dismissed for want of jurisdiction. If the appeal is not dismissed, the Court should find that Appellant failed to preserve its arguments for appellate review, or if it reaches the merits, should find that the trial court did not abuse its discretion in the challenged rulings.

SUMMARY OF THE ARGUMENT

- **There is no appellate jurisdiction**

Prior to considering the merits of Appellant's appeal, the Court should consider whether appellate jurisdiction exists. A State's interlocutory appeal from an exclusionary order requires the notice of appeal to include a personal certification by the elected prosecuting attorney that the appeal is not taken for the purpose of delay and that the evidence is of substantial importance in the case. This certification is a prerequisite to appellate jurisdiction. This is a solemn undertaking; the elected prosecutor must place his reputation and integrity, as well as his signature, on the line.

Appellant's notice of appeal recites that "the State" so certifies, not that the prosecuting attorney personally does so. The prosecuting attorney substituted a representative-capacity certification for the personal certification required by law. He did not place his personal reputation and integrity on the line. The appeal should be dismissed for want of jurisdiction.

- **The trial court did not abuse its discretion in ruling on admissibility of evidence at a pretrial hearing.**

Appellant's first ground for review combines two complaints. First, it argues that the trial court should not have decided at a pretrial hearing whether evidence was admissible over objections based on Rules 402 (relevance), 403 (balancing relevance

against other considerations), and 802 (hearsay). Second, it argues that the trial court should not have placed the burden on the State to prove the admissibility of evidence over these objections. For clarity of analysis, Appellee addresses these complaints separately.

In the first sub-part, Appellant's argument appears to be that these evidentiary rulings cannot be made in advance of trial, because they require the trial court to hear all of the trial evidence before deciding whether particular testimony is relevant, or its relevance is outweighed by other considerations of Rule 403, or even whether it is hearsay. This argument is not preserved for review. Appellant did not assert a timely objection to the trial court making these rulings before trial. Its post-ruling statement that it did not believe the court could properly take into account the relevance of the recordings without the context of trial did not preserve anything for review.

Nonetheless, a trial court's discretion to rule on admissibility of evidence before trial is well-settled. Rule 104 requires preliminary hearings on admissibility of evidence to be conducted outside of the jury's presence; these preliminary hearings can be conducted before trial. If Appellant's argument were accepted, no trial court could ever decide whether any evidence was relevant or admissible until the trial was over.

The second sub-part of Appellant's first ground for review is also not preserved. No objection was voiced in the trial court regarding the burden of proof, and in fact, the

record does not establish that the trial court did place any burden of proof on the State. Appellant chose to offer no evidence. The trial court therefore ruled on the basis of the evidence presented by Villegas, the recordings. However, this circumstance provides no basis for concluding that the trial court placed a burden of proof on the State. This issue is merely manufactured on appeal in an attempt to obtain reversal.

However, if it did place a burden of proof on Appellant, the trial court did not err in doing so. Appellant misapplies caselaw arising in the context of motions to suppress based on Constitutional or statutory violations. The recordings were excluded under the Rules of Evidence, not based on violations of constitutional or statutory rights. When an objection is based on the Rules of Evidence, the burden of proving admissibility is the same at a pretrial hearing as it is at trial.

Moreover, even if the initial burden was on Villegas, Villegas's evidence (the recordings) was sufficient to show the recordings inadmissible. Contrary to Appellant's suggestion that Villegas presented no evidence, the trial court listened to the recordings at his request. It is undisputed that these recordings were constructively admitted. The content of the recordings is sufficient to demonstrate that they are inadmissible under Rules 402, 403, and 802. This shifted the burden to Appellant to demonstrate admissibility. There was no procedural error in the trial court's rulings.

- **The trial court did not abuse its discretion in excluding recordings.**

Appellant's second ground for review argues that the Court of Appeals misapplied the standard of review for a trial court's decision to exclude evidence as irrelevant. However, its argument does not describe alleged error in the Court of Appeals' analysis; instead, it merely regurgitates its arguments that the excluded recordings should have been admitted. Appellant's argument fails to consider the trial court's discretion, and invites appellate courts to make a *de novo* evaluation of whether a reasonable person would find the testimony probative.

It is well-established that a trial court's evidentiary rulings are subject to abuse-of-discretion review, not *de novo* review. Under this standard of review, when evaluating relevance, the question is not whether the appellate court believes any reasonable juror would have found the evidence made any fact of consequence more probable. Instead, the question is whether a reasonable trial judge could have concluded, in his evaluation of common experience, that reasonable jurors would have reached this conclusion. Relevance and Rule 403 evaluations are inherently within the trial court's discretion. The Court of Appeals properly applied the abuse-of-discretion standard of review.

Appellant's theory for relevance of the recordings hinges on a lengthy chain of unsupported assumptions, suppositions, inferences, and leaps of logic. The trial court

did not abuse its discretion in finding them irrelevant. Furthermore, the trial court did not abuse its discretion in concluding that any possible slight relevance is outweighed by the other considerations of Rule 403 – including prejudice to Villegas from informing the jury that he was previously convicted and previously incarcerated, the delay associated with introduction of the recordings and rebuttal evidence made necessary by the accusations, the "mini-trial" that would result to determine what was said and what was meant, the confusion and Appellant's attempts to mislead the jury about the content and meaning of the recordings, and the distraction of the jury's attention from the alleged crime at issue to the tangential accusations of Appellant's brief.

The second ground on which this Court granted discretionary review concerned only the standard for reviewing relevance and Rule 403 determinations. In its argument, Appellant attempts to expand this ground, to argue that the trial court erred in excluding recordings as hearsay. Because Appellant's second ground for review does not encompass the hearsay rulings, the Court should not address this argument, and should not review the affirmance of the trial court's hearsay determinations.

However, if it reaches the merits, the Court should find no abuse of discretion. Appellant claims that the statements are not offered for the truth, but it failed to articulate to the trial court any basis on which the statements were relevant if they are

not true. It did not articulate, in the trial court or the Court of Appeals, any basis for admitting double and triple hearsay (statements within the recordings which repeat past unrecorded statements of others). Appellant claims that out-of-court statements are admissible based on a claimed agency relationship or an invented conspiracy theory, but there is no evidence to support these theories. No abuse of discretion is shown in the exclusion of hearsay.

For all of these reasons, the opinion below should either be vacated for want of appellate jurisdiction and the appeal ordered dismissed, or the judgment should be affirmed.

ARGUMENT

I. There is no appellate jurisdiction.

This is an attempted interlocutory appeal by the State from a trial court order excluding evidence. However, appellate jurisdiction over such appeals is limited by statute, and exists only when the prosecuting attorney personally certifies that the evidence is of substantial importance in the case and the appeal is not taken for the purpose of delay. This Court has made clear that this certification requirement is the personal obligation of the elected district attorney, and mere recitation of the statutory language is insufficient. Instead of a personal certification by the district attorney, the notice of appeal recites that "the State" so certifies. Absent a personal certification by the prosecuting attorney, appellate jurisdiction does not exist.

The State's right of appeal in criminal matters is defined and limited by statute. TEX.CODE CRIM.PRO. art. 44.01; *see* TEX.R.APP.P. 25.2(a)(1). Appeals by the government are "carefully circumscribed" in order to "safeguard individuals from the special hazards inherent in prolonged litigation with the sovereign." *State v. Redus*, 445 S.W.3d 151, 154 n. 13 (Tex.Crim.App. 2014).[18] The State attempts to appeal

[18] This statement from *Redus* quotes authority describing federal government appeals. However, Article 44.01 is intended to afford the State the same appellate powers as the federal government. *State v. Moreno*, 807 S.W.2d 327, 332 (Tex.Crim.App. 1991). And the federal certification-of-appeal requirement serves the same purpose as the Texas requirement. *Redus*, 445 S.W.3d at 157.

pursuant to Texas Code of Criminal Procedure article 44.01(a)(5), which permits an appeal from an order granting a motion to suppress evidence. In order to appeal, the State must strictly comply with Article 44.01. Noncompliance with Article 44.01's specific provisions is "a substantive failure to invoke the court of appeals' statutorily defined jurisdiction." *State v. Riewe*, 13 S.W.3d 408, 411 (Tex.Crim.App. 2000), *quoting State v. Muller*, 829 S.W.2d 805, 812 (Tex.Crim.App. 1992).

Article 44.01(a)(5) permits an appeal from an order granting a motion to suppress "if ***the prosecuting attorney certifies*** to the trial court that the appeal is not taken for the purpose of delay and that the evidence, confession, or admission is of substantial importance in the case[.]" TEX.CODE CRIM.PRO. art. 44.01(a)(5) (emphasis added). The Rules of Appellate Procedure require compliance with Article 44.01, including this certification requirement, for a notice of appeal to be "sufficient." *Riewe*, 13 S.W.3d at 411; TEX.R.APP.P. 25.2(c)(2). The prosecuting attorney's certification is thus necessary to confer appellate jurisdiction. *Redus*, 445 S.W.3d at 152; *Riewe*, 13 S.W.3d at 409, 411. For this reason, any attempted appeal by the State must be dismissed for want of jurisdiction if the proper certification is not filed within 20 days after the trial court enters its order suppressing evidence. *Redus*, 445 S.W.3d at 156.

The statutory certification requirement is no mere technicality; it carries serious purpose. *Redus*, 445 S.W.3d at 157. Article 44.01(a)(5) was drafted so that, as a

practical matter, the State will appeal pretrial suppression orders only when the trial judge's ruling effectively puts an end to the case, or when a point of law is deemed so crucial and so likely to recur that an adverse ruling is "devastating to the legal system or the concept of fair play." *Id.* at 154. The required certification by the district attorney is thus intended to mandate a conscientious pre-appeal analysis and a careful appraisal of the likelihood of success and necessity for review before an appeal is undertaken. *Id*. at 154, 155 n. 14. It is also intended to ensure that prosecutors do not appeal trial judges' rulings indiscriminately and clog up appellate courts while leaving the defendant under the continuing cloud of criminal charges.[19] *Id.* at 154.

The statutory requirement is not a mere "technicality." *Redus*, 445 S.W.3d at 157. It ensures that the prosecutor carefully analyzes the case before deciding to appeal. *Id.* "Courts are not 'hypertechnical' in requiring the elected prosecutor to actually vouch for the facts that his interlocutory appeal is not being taken for purposes of delay and that the evidence suppressed is of 'substantial importance' to the case." *Id.* at 158.

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[19] Appellee contends that this is just the sort of indiscriminate appeal that the certification requirement is intended to prevent. However, when an appeal has been properly certified by the prosecuting attorney, the verity of that certification is unreviewable. *Redus*, 445 S.W.3d at 156.

Significantly, the requirement of certification is personal to the elected prosecuting attorney. The "prosecuting attorney" is defined to mean the district or county attorney with primary responsibility for prosecuting cases in the court, and does not include an assistant prosecuting attorney. TEX.CODE CRIM.PRO. art. 44.01(i). The statute is not satisfied by certification by an assistant prosecuting attorney. *Redus*, 445 S.W.3d at 154, n. 12; *Muller*, 829 S.W.2d at 808-09. The failure of the elected prosecuting attorney to make the certification is a jurisdictional defect. *Riewe*, 13 S.W.3d at 410; *Muller*, 829 S.W.2d at 811-12.

Therefore, an appeal is permitted only if "the elected prosecutor ***personally*** certifies" to the statutory requirements. *Redus*, 445 S.W.3d at 154 (emphasis added). The certification is itself a representation, by an officer of the court, that the appeal is not for delay and the suppressed evidence is material. *Id.* at 155 n. 14.[20] "The elected prosecutor puts his reputation and integrity, as well as his signature, on the line in filing notice of an interlocutory appeal." *Id.* at 154-55. Accordingly, "the elected prosecutor's ***personal*** certification is necessary to confer jurisdiction on the appellate court." *Id.* at 155 (emphasis added). This "is a simple, but solemn, undertaking." *Id.* at 156.

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[20] Quoting federal authority; *see* footnote 18, *supra*.

Furthermore, mere recitation of the statutory language is insufficient. *Redus*, 445 S.W.3d at 158. And any inference that might be drawn from the district attorney's signature on a notice of appeal reciting the statutory language is also insufficient to satisfy the statute. *Id.* at 157. Thus, in *Redus*, this Court ruled that the court of appeals lacked jurisdiction when the notice of appeal quoted the statutory language, and was signed by the elected district attorney; but he did not explicitly certify, or vouch for, the required facts. *Id.* at 153, 156-57. This Court affirmed the Court of Appeals' holding that "a recitation of the pertinent Code provision does not amount to a certification, as required by Article 44.01(a)(5)." *Id*. at 153.

As explained in *Redus*, the certification will normally take the form "I, John Doe, the District Attorney of XYZ County, certify that ... ." *Redus*, 445 S.W.3d at 156. No special form is required; whatever form is used, however, the elected prosecuting attorney must personally vouch for the statutorily-required facts. *Id.*

Appellant's notice of appeal in this case does not contain a personal certification by the prosecuting attorney. It does not certify that the elected prosecutor personally vouches for the facts he is required by Article 44.01 to certify. Instead, it recites that "***The State certifies*** that jeopardy has not attached in this case, the appeal is not taken for the purpose of delay, and the evidence is of substantial importance in the case." (22CR:7843; see Appendix 3) (emphasis added). The literal text of Article 44.01 is

clear, and it is construed in accordance with its plain meaning. *Muller*, 829 S.W.2d at 808. A certification by "the State," rather than a personal certification by the prosecuting attorney, does not satisfy the plain language of Article 44.01(a)(5).

The Court of Appeals denied Appellee's motion to dismiss, writing

> District Attorney Esparza is the representative of the State in this felony prosecution. By signing the notice of appeal as the representative of the State, Esparza personally certified that the appeal from the trial court's order excluding the described evidence is not taken for the purpose of delay and the evidence is of substantial importance in the case.

Villegas, 460 S.W.3d at 170 (citations omitted). This analysis is inconsistent with *Redus*, for two reasons:

Most significantly, the Court of Appeals substituted a representative-capacity certification for the required personal certification. The statute requires personal certification by the elected prosecutor. *Redus*, 445 S.W.3d at 154-55. Only a personal certification satisfies the purposes of the statute. *Id.* at 154-56. The statute is therefore not satisfied by a certification by the State, signed by the district attorney in his representative capacity. By signing "as the representative of the State," Esparza did not "personally" certify anything.

Second, the Court of Appeals inferred the prosecuting attorney's personal certification from his signature on a notice of appeal stating that the State so certifies.

However, the prosecutor's personal certification can not be established inferentially. *Redus*, 445 S.W.3d at 157.

In the absence of a personal certification, personally vouching for the facts required to be personally certified by the elected prosecutor, the notice of appeal was not sufficient to confer appellate jurisdiction. Therefore, the Court of Appeals should have dismissed the appeal.

It was unnecessary for Villegas to file a petition for discretionary review to challenge the Court of Appeals' erroneous exercise of appellate jurisdiction; jurisdiction is a fundamental threshold issue, and cannot be conferred by consent. *State v. Roberts*, 940 S.W.2d 655, 657 (Tex.Crim.App. 1996), *overruled on other grounds, State v. Medrano*, 67 S.W.3d 892 (Tex.Crim.App. 2002); *State v. Palmer*, 469 S.W.3d 264, 268 (Tex. App.–Fort Worth 2015, pet. ref'd). Because appellate jurisdiction does not exist, the appropriate action is for this Court to vacate the Court of Appeals' judgment and remand with instructions to dismiss the appeal. *State v. Taft*, 958 S.W.2d 842, 843 (Tex.Crim.App. 1998); *Roberts*, 940 S.W.2d at 660. The Court should order this appeal dismissed.

II. There is no reversible error in connection with the trial court's decision to rule on admissibility of evidence at a pretrial hearing. (Appellant's ground for review one [part]).

Appellant's first issue seemingly argues that the trial court has no discretion at all to make a pretrial ruling on the admissibility of recordings, or at least no discretion to exclude evidence at such a hearing based on relevance, hearsay, and Rule 403. This issue is not preserved for review, and even if preserved, the court's decision to hold a pretrial hearing is not an appealable order. However, no authority supports Appellant's extreme proposition, and it is contrary to well-established law.

A. Appellant's objection to the pretrial ruling is not preserved for appellate review, because it was not asserted in the trial court.

Texas Rule of Appellate Procedure 33.1 requires, as a prerequisite to appellate review, that a party present a timely objection to the trial court and obtain a ruling. TEX.R.APP.P. 33.1. This principle applies to the State just as it applies to any other appellant. *State v. Mercado*, 972 S.W.2d 75, 78 (Tex.Crim.App. 1998). The Court of Appeals did not rule on whether Appellant preserved its issue for appellate review; it explicitly assumed without deciding that the argument was preserved. *Villegas*, 506 S.W.2d at 730 n. 6.

The record does not include any timely objection by Appellant to the trial court conducting a pretrial hearing on the admissibility of the recordings, or entering a

pretrial ruling excluding evidence based on Rules of Evidence 402, 403, or 802. To assert that error was preserved, Appellant points to a soliloquy by an assistant district attorney – after the hearing concluded and after the trial court had ruled – referring to something that he claims occurred in chambers. (9RR:100). That attorney stated that in an unrecorded chambers conversation,

> the State had indicated to the Court that we thought it was improper for the Court -- or that the Court wouldn't be able to properly rule on the admissibility of phone calls without the context of trial, that we wanted to wait until trial to have this ruling. We just wanted to make that clear for the record that we still don't think that the Court was able to take into account the relevance of the phone calls not being in trial.

(9RR:100). This post-ruling statement does not reflect that Appellant ever objected to the trial court conducting that hearing; only that its attorneys "indicated" that they "thought" the trial court would not be able to "properly rule" without the context of trial evidence. (9RR:100). But the trial court did not do anything to prevent Appellant from offering any evidence it considered necessary as context to properly evaluate the admissibility of the recordings. (9RR:1-98). Additionally, this statement refers to relevance, but makes no reference to Rules 403 or 802, Rules of Evidence which Appellant now contends a trial court may not consider in a pretrial hearing. Neither the trial court nor Villegas's attorney replied to this post-ruling statement. (9RR:100).

Rule 33.1 requires that "the record must show" a "timely" complaint to the trial court. TEX.R.APP.P. 33.1(a). "[A]ll a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App. 1992); *see also Patterson v. State*, 353 S.W.3d 203, 212 (Tex.App.–San Antonio 2011, pet. ref'd) (after-the-fact objections are insufficient to preserve error). The record does not include a timely objection by Appellant, and does not establish that any off-the-record statement referred to in this soliloquy properly and timely asserted the objections it raises now. In the absence of a timely objection to the trial court conducting the hearing, or deciding to exclude evidence based on Rules 402, 403, and 802, Appellant's first complaint is not preserved. TEX.R.APP.P. 33.1. The Court should therefore affirm the judgment below without regard to the merits.

B. The trial court's decision to hear evidentiary objections in a pretrial hearing on admissibility is not an appealable order.

Even if Appellant had objected to the trial court conducting a pretrial hearing on admissibility of evidence, and even if the trial court had overruled that objection, that

ruling would not be appealable.[21] As noted above, the State's right of appeal in criminal matters is defined and limited by statute. TEX.CODE CRIM.PRO. art. 44.01. Appeals by the government are "carefully circumscribed" in order to "safeguard individuals from the special hazards inherent in prolonged litigation with the sovereign." *Redus*, 445 S.W.3d at 154 n. 13. The State may only appeal those orders defined as appealable in Article 44.01. *See State v. Cowsert*, 207 S.W.3d 347, 350-51 (Tex.Crim.App. 2006) (holding the State could not appeal an order denying a motion to reconsider an order granting a motion to suppress, because an order denying reconsideration is not an appealable order under Article 44.01).

Appellant filed this appeal under Code of Criminal Procedure Article 44.01(a)(5). (22CR:7842). That subsection permits an appeal from an order that "grants a motion to suppress evidence, a confession, or an admission" in certain circumstances. TEX.CODE CRIM.PRO. art. 44.01(a)(5). It has been interpreted to permit an appeal from a pretrial order excluding evidence for procedural or evidentiary reasons. *State v. Medrano*, 67 S.W.3d 892, 901, 903 (Tex.Crim.App. 2002). However,

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[21] In a footnote, Appellant states that it does not "simply" attack the trial court's decision to conduct a hearing, indicating that the decision to conduct a hearing is at least one of its complaints. (A'nt brf. p. 24 n. 21). The same footnote cites *State v. Hill* to claim that such an order is appealable, but *Hill* did not discuss the appealability of a decision to conduct a pretrial hearing on admission of evidence. *State v. Hill*, 499 S.W.3d 853, 864 (Tex.Crim.App. 2016). The case involved an appeal from a pretrial order dismissing an indictment. *Id.* at 854.

an order that a hearing will be conducted (or overruling some unstated objection to conducting a hearing) can not reasonably be characterized as an order "grant[ing] a motion to suppress evidence." The decision to conduct the hearing therefore is not reviewable on the State's appeal, and the Court should not address the merits of this complaint.

C. Appellant's objection to the trial court's decision to make a pretrial ruling excluding hearsay is not preserved for this Court's review, because it was not asserted in the Court of Appeals.

Additionally, Appellant failed to preserve for this Court's review its complaint that the trial court lacked discretion to make pretrial rulings excluding evidence on hearsay grounds, because it failed to present this argument to the Court of Appeals. To preserve an argument for this Court's review, a party must first present it to the Court of Appeals. "[T]o ensure that [this Court] review[s] only decisions of the courts of appeals, we insist that the parties, in an orderly and timely fashion, provide the courts of appeals with the first opportunity to resolve the various issues associated with the appeal[.]" *Farrell v. State*, 864 S.W.2d 501, 503 (Tex.Crim.App. 1993); *see also Lambrecht v. State*, 681 S.W.2d 614, 616 (Tex.Crim.App. 1984) (the rules of appellate procedure "do not authorize review of claims which have not been presented in an orderly fashion and determined by the appropriate court of appeals").

In the Court of Appeals, Appellant argued that the trial court lacked discretion to exclude evidence under Rule 403 in a pretrial hearing, and stated (without elaboration) its position that the trial court lacked jurisdiction to exclude evidence as irrelevant in a pretrial hearing. However, it did not even mention the same argument with respect to the hearsay rulings. (A'nt COA brf. pp. 43-65). To the extent Appellant's first ground for review makes this complaint regarding exclusion of recordings as hearsay, this argument was never presented to the Court of Appeals, and is waived.

D. The trial court did not abuse its discretion in ruling on the admissibility of evidence in a pretrial hearing.

If the Court reaches the merits, this aspect of Appellant's first issue should be overruled. Article 28.01 of the Code of Criminal Procedure grants a trial court discretion to hold a pretrial hearing on preliminary matters, including suppression of evidence. TEX.CODE CRIM.PRO. art. 28.01, § 1(6). Its decision to do so is reviewed only for an abuse of discretion. *State v. Hill*, 499 S.W.3d 853, 865 (Tex.Crim.App. 2016).

The Rules of Evidence place the responsibility on the trial court to conduct proceedings so as to prevent inadmissible evidence from being suggested to the jury. TEX.R.EVID. 103(d). Preliminary questions regarding admissibility must be determined

by the court, and hearings on preliminary matters must be conducted out of the hearing of the jury. TEX.R.EVID. 104(a), (c). The word "preliminary" in Rule 104 does not dictate at what point in the proceedings the determination is made. *Cox v. State*, 843 S.W.2d 750, 752 (Tex.App.–El Paso 1992, pet. ref'd). The decision of whether to conduct a pretrial hearing on admissibility "rests within the sound discretion of the trial court." *Id., citing Calloway v. State*, 743 S.W.2d 645, 649 (Tex.Crim.App. 1988). No authority prohibits trial courts from deciding at a pretrial hearing to exclude evidence based on Rule 402, Rule 403, or Rule 802.

Appellant agrees that a trial court has discretion to conduct pretrial hearings on the admissibility of evidence. (A'nt brf. p. 23). Appellant has cited no authority even suggesting that pretrial rulings excluding evidence based on Rule 402 (relevance) or Rule 802 (hearsay) are ever inappropriate. The trial court's discretion also includes determining to exclude evidence based on the balancing of Rule 403. *State v. Mechler*, 153 S.W.3d 435, 440 (Tex.Crim.App. 2005). Contrary to the assertion of Appellant's brief (p. 26), this Court did not hold in *Mechler* that Rule 403 objections are "rarely appropriate" for pretrial disposition. *Id*.

In *Mechler*, this Court noted the factors relevant to a Rule 403 analysis. *Mechler*, 153 S.W.3d at 440. The Court wrote, "The fact that this Rule 403 determination occurred pretrial in the form of a motion to suppress does not alter either

an appellate or trial court's use of the factors[.]" *Id.* The Court recognized the possibility that in some cases, a trial court might not have sufficient information to make an evaluation before trial; but "In this case, the trial court heard sufficient testimony at the suppression hearing necessary to properly evaluate the motion on Rule 403 grounds." *Id.* No Texas authority suggests that pretrial rulings excluding evidence based on Rules 402, 403, or 802 are inherently inappropriate.

Appellant relies largely on Judge Cochran's concurring opinion in *Mechler*, and that opinion's citation to authority from the United States Court of Appeals for the Third Circuit. But neither *Mechler* nor the Third Circuit holds that pretrial Rule 403 rulings are never appropriate. To the contrary, *Mechler* held that the pretrial context of the ruling did not alter either the standard of review or the factors relevant to the analysis. *Mechler*, 153 S.W.3d at 439, 440. Since *Mechler*, Texas courts have continued to conduct pretrial hearings on the admissibility of evidence under Rule 403. *See, e.g., Ramirez v. State*, 2011 WL 1196886 at *15 n. 10 (Tex.Crim.App. 2011) (not desig. for publication) (stating Rule 403 objection was preserved for appeal when overruled by trial court in pretrial admissibility hearing)[22]; *Greene v. State*, 287 S.W.3d 277, 284 (Tex.App.–Eastland 2009, pet. ref'd) (referring to trial court performing Rule

[22] *Ramirez* is cited as an example, recognizing that as an unpublished opinion, it is non-precedential. *See Ex parte Perez*, 398 S.W.3d 206, 215 n. 10 (Tex.Crim.App. 2013) (citing unpublished opinions as examples).

403 balancing test during a pretrial hearing). And even the Third Circuit, although advocating a "cautious" approach, has nonetheless found pretrial Rule 403 rulings permissible. *See In re Paoli R.R. Yard PCB Litig*., 35 F.3d 717, 734 and 783 n. 50 (3rd Cir. 1994) (stating that district court's Rule 403 exclusion was based on an adequate record).[23]

In this case, as in *Mechler*, the trial court had sufficient information to make its decision. It listened to the recordings in their totality. (9RR:5). It allowed Appellant to present whatever additional evidence or argument it desired to assist its evaluation of the recordings, although Appellant chose to present no further evidence. (9RR:1-98). And as recognized by the Court of Appeals, the trial court had extensive background information about the case; by agreement of the parties, it took judicial notice of the prior proceedings, including the two prior trials and the lengthy proceedings on Villegas's application for writ of habeas corpus. *Villegas*, 506 S.W.3d at 731. Therefore, the trial court knew much more about the circumstances underlying this case than a trial court can usually be expected to know.

Furthermore, the trial court did not abuse its discretion in perceiving that it was not practical to await the trial to make its evidentiary rulings in this case. Appellant

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[23] The Federal Rules of Evidence also explicitly contemplate rulings before trial on the admissibility of evidence. FED.R.EVID. 103(b).

produced hundreds of hours of recordings. (3RR:5-7). Deciding their admissibility during trial would require the court to recess the trial for days or weeks at a time to listen to and consider the relevance of whatever recordings may be offered, and whether their prejudicial effect substantially outweighs any probative value. It would also force Villegas's counsel to request mid-trial breaks of days or weeks to determine which portions of the hundreds of hours of recordings are appropriate to rebut whichever excerpts Appellant may offer during trial. In these circumstances, the trial court properly exercised its "sound discretion" to decide the admissibility of the recordings in a pretrial hearing. *Cox*, 843 S.W.2d at 752.

Appellant repeatedly makes the blanket claim that the admissibility can not be evaluated in the absence of all of the evidence that will be offered at trial, but points to nothing in the record to support its generalizations. It identifies no specific additional evidence that it contends was necessary for the trial court to make its decision, and provides no explanation for failing to offer that evidence at the hearing if in fact it was necessary. Appellant provides no reason why in this specific case, as opposed to every case, a trial court may not rule on the admissibility of the recordings before trial. There is nothing in the record to establish that the trial court could not have evaluated the admissibility of the recordings prior to trial in the circumstances of this particular case. Appellant's generalizations provide no basis for finding an abuse of discretion.

Appellant seeks to draw support from cases holding that trial judges may not decide ultimate issues in the case at a pretrial hearing, when all of the evidence is necessary to determine that ultimate issue. *Petetan v. State*, __ S.W.3d __, No. AP-77,038, 2017 WL 2839870 at *45 (Tex.Crim.App. Mar. 8, 2017) (determination of whether defendant was exempt from the death penalty due to mental retardation); *State v. Iduarte*, 268 SW.3d 544, 551-52 (Tex.Crim.App. 2008) (sufficiency of the evidence to support an element of the offense); *Woods v. State*, 153 S.W.3d 413, 415 (Tex.Crim.App. 2005) (same). However, these authorities are clearly distinct. They concern ultimate issues in the case which must be evaluated based on the evidence as a whole, and decided after all the evidence is admitted, not evidentiary issues. As the Court of Appeals recognized, *Woods* and its progeny involved "idiosyncratic suppression orders so enmeshed with the merits of the case-in-chief that the suppression question could not be resolved pretrial, either because it would require the trial court to make a finding that evidence underpinning an element of the offense was legally insufficient (i.e., implicitly rule on guilt or innocence), or because it would require the trial court to make a credibility determination that necessarily renders an element of the crime legally insufficient." *Villegas*, 506 S.W.3d at 733. The evidentiary rulings in this case are not similar to the rulings on ultimate issues addressed in *Woods* and its progeny.

Unlike the ultimate findings at issue in *Woods* and its progeny, a trial court must always make evidentiary rulings before hearing all of the evidence – otherwise, a court could not decide whether any evidence is admissible or inadmissible until the trial was over. Indeed, Appellant makes vague arguments that evaluating the probative value of evidence requires a trial court to hear its entire "guilt-innocence case in chief" and "also the defense case," which raises the question of when the trial court is to decide whether proffered evidence is relevant and admissible. (A'nt brf. p. 26). Also unlike the rulings in *Woods* and its progeny, as the Court of Appeals emphasized, pretrial evidentiary rulings are generally subject to reconsideration as evidence develops at trial. Unlike the rulings dispositive of ultimate issues in those cases, the trial court's decision in this case might be described as simply a "glorified motion in limine" ruling. The *Woods* line of authority does not apply, and the rationale of those cases is inapplicable to render all pretrial evidentiary rulings under Rules 402, 403 and 802 beyond the trial court's discretion.

In connection with this argument, Appellant criticizes the Court of Appeals for purportedly deferring to the trial court's credibility determinations. This is a red herring. As the Court of Appeals recognized, "there is no indication the trial court made credibility determinations in weighing the evidence, or that it made pretrial

findings that would acquit Villegas by suppressing the evidence." *Villegas*, 506 S.W.3d at 733.

Appellant's argument would prohibit a trial court in any case from ever making a pretrial ruling or even a mid-trial ruling based on Rule 402, 403, or 802, instead requiring courts to rule only after hearing the prosecution's entire "guilt-innocence case in chief" and "also the defense case." (A'nt brf. p. 26). No authority supports imposing this limit on evidentiary rulings. There is nothing to be gained by adopting a novel legal rule that a trial court can not decide whether Rules 402, 403, and 802 apply to proffered evidence before or even during trial.

Appellant fantasizes that if a trial judge does not approve of its decision to prosecute a certain case, he or she will "force a dismissal" with unreasonable pretrial rulings. (A'nt brf. p. 39). This Court should not presume that any judge would ignore his or her oath of office, and certainly should not adopt a new legal rule limiting judges' discretion to make pretrial evidentiary rulings based on such a presumption. A judge who is determined to "force a dismissal" can make any number of unreviewable decisions to force the prosecution's hand; whereas, if pretrial evidentiary rulings are incorrect, and the evidence is substantially important to the case, the State has a right to appeal. TEX.CODE CRIM.PRO. art. 44.01(a)(5). Since such decisions are reviewable

in appropriate cases, Appellant's flight of fantasy provides no rational basis for limiting the discretion of trial courts to make pretrial decisions on admissibility of evidence.

For all of these reasons, Appellant has not shown an abuse of discretion by the trial court in ruling at a pretrial hearing on the admissibility of the jail recordings. This aspect of its first issue should be overruled.

III. There is no reversible error in connection with the burden of proof at the pretrial hearing. (Appellant's ground for review one [part]).

A. This argument was also not preserved in the trial court.

Appellant's first ground for review also argues in part that the trial court erred to the extent it placed any burden of proof on the State. This argument is not preserved for appellate review. There was no objection, and in fact, no reference at all to the burden of proof in the hearing on admissibility of the recordings. (9RR:1-98). Appellant does not point to any objection in the trial court making reference to the burden of proof, or otherwise preserving this issue. In the absence of a timely request, objection, or motion, stating the complaint it presents on appeal, this aspect of Appellant's first ground is not preserved for review. TEX.R.APP.P. 33.1; *Mercado*, 972 S.W.2d at 78. The Court should not address the merits of this argument.

B. The record does not demonstrate that any burden of proof was placed on Appellant.

There is a straightforward reason Appellant did not object in the trial court to preserve this issue for appellate review: The record does not demonstrate that the trial court did place any burden of proof on Appellant. Appellant has simply manufactured this issue in an attempt to secure appellate reversal.

The only evidence offered by either party was the recordings themselves, which the trial court reviewed *in camera* at Villegas's request. (9RR:5, 1-98; 22CR:7706).

The parties agree that the recordings were considered by the trial court and constructively admitted at the hearing, for purposes of considering their admissibility at trial. *See* A'nt COA brf. p. 49 n. 43, *citing Cornish v. State*, 848 S.W.2d 144, 145 (Tex.Crim.App. 1993) ("evidence which, although not formally introduced is nevertheless treated by the trial court and the parties as if it had been, may be considered on appeal as if admitted") (additional citations omitted). The trial court therefore had sufficient evidence before it, the recordings, to determine that they were inadmissible. The trial court gave Appellant the opportunity to present any additional evidence it may have desired to present; this does not mean that the trial court placed any burden of proof on Appellant.

Because the record does not establish that any burden of proof was in fact placed on Appellant, this aspect of Appellant's first ground for review provides no basis for reversal. If it finds the issue preserved, the Court should overrule this ground.

C. Even if the trial court placed a burden of proof on the State, it did not err in doing so.

If the Court finds it appropriate to address the merits of this argument despite this record, Appellant's first ground for review should be overruled. Appellant argues that in any pretrial motion to suppress or exclude evidence, the burden of production and

persuasion falls on the defendant. (A'nt brf. p. 34-35). However, Appellant understates its burden as the proponent of evidence.

1. In a motion to exclude evidence based on Rules of Evidence, rather than constitutional or statutory violations, the burden is the same as it would be at trial.

The burdens of proof in a hearing on a motion to suppress depend on the basis of the motion. When a motion is based on a constitutional violation, the defendant has the initial burden to produce evidence defeating the presumption of proper police conduct, such as by producing evidence of a warrantless arrest. The presentation of this evidence shifts the burden to the prosecution to produce evidence that no constitutional violation occurred, such as by showing that the seizure was reasonable. *State v. Robinson*, 334 S.W.3d 776, 779 (Tex.Crim.App. 2011); *Ford v. State*, 158 S.W.3d 488, 492 (Tex.Crim.App. 2005). When a motion to suppress is based on a purely statutory violation, the burden is on the defendant to prove noncompliance with the statute. Only if this burden is met does the prosecution have any burden to prove compliance. *Robinson*, 334 S.W.3d at 779.

However, when the motion is based on the Rules of Evidence, as in this case, the same burdens applicable at trial apply to the motion. *State v. Esparza*, 413 S.W.3d 81, 86 (Tex.Crim.App. 2013) (examining exclusion under Rule 702). Once the opposing party objects, the proponent bears the burden of demonstrating admissibility of the

evidence. *Id*. Allocation of this burden under the rules of evidence "should be no different in the context of a pretrial motion to suppress than it is when the issue is raised during the course of a trial." *Id*. Thus, once an evidentiary objection is either made by the defendant or raised by the trial court, the prosecution must present evidence sufficient to overcome the Rules-based evidentiary objection. *Id.*. Appellant's brief in the Court of Appeals recognized that as "the proponent of the evidence at trial, it must fulfill all required evidentiary predicates and foundations."[24] (A'nt COA brf. p. 63). As such, it carried the same burden at the pretrial hearing. *Esparza*, 413 S.W.3d at 86.

The cases cited by Appellant are not to the contrary. Each of them involved the shifting burdens in the context of a motion to suppress evidence based on either an alleged constitutional violation or statutory violation. *Robinson*, 344 S.W.3d at 778; *State v. Kelly*, 204 S.W.3d 808, 809 (Tex.Crim.App. 2006); *Pham v. State*, 175 S.W.3d 767, 769-70 (Tex.Crim.App. 2005); *Mattei v. State*, 455 S.W.2d 761, 766 (Tex.Crim.App. 1970). These cases therefore do not describe the burden of proof in the context of the trial court's rulings in this case, based on the Rules of Evidence; in

[24] Appellant's brief oddly asserts that the Court of Appeals accepted Villegas's assertion that satisfying evidentiary predicates and foundations was Appellant's burden at trial (A'nt brf. p. 34); the statement in Villegas's appellate brief quoted by Appellant was itself a quote from Appellant's own brief in the Court of Appeals. (See Villegas' brief in the Court of Appeals, pp. 73-74, quoting A'nt COA brf. p. 63).

this case, the burden is no different than it would be at trial. *Esparza*, 413 S.W.3d at 86.

2. Even if the initial burden was on Villegas, he satisfied that burden by presenting the recordings, which were constructively admitted into evidence.

Even if (as Appellant contends), *Esparza* is limited to motions to suppress or exclude expert testimony, that does not mean that Appellant had no burden of proof. In a traditional suppression hearing based on constitutional or statutory violations, after the movant presents evidence of such a violation, the burden shifts to the State. *See Delafuente v. State*, 414 S.W.3d 173, 176 (Tex.Crim.App. 2013) ("In a hearing on a motion to suppress for violation of Fourth Amendment rights, a defendant must offer evidence that rebuts the presumption of proper police conduct, such as by alleging that the search or seizure was executed without a warrant. Once the defendant has made this threshold showing, the burden shifts to the state to prove either the existence of a warrant or that the search or seizure was reasonable."); *Robinson*, 334 S.W.3d at 777 (in a motion to suppress under Texas Code of Criminal Procedure Article 38.23, the defendant has the initial burden, which shifts to the State when the defendant has produced evidence of a statutory violation).

Appellant argues that **"Beyond the recordings**, Villegas put forth no evidence[.]" (A'nt brf. p. 38, emphasis added). Villegas requested that the trial court

listen to the recordings at issue in their entirety *in camera* (22CR:7706) and the court did so (9RR:5). Thus, the recordings were constructively admitted, as Appellant admitted below. *Cornish*, 848 S.W.2d at 145; A'nt COA brf. p. 49 n. 43. It is self-evident that the recordings are out-of-court statements, inadmissible for the truth of the matter asserted unless a hearsay exception exists. The contents of the recordings demonstrate that they are irrelevant, or any possible relevance is outweighed by the other considerations of Rule 403. Villegas was not required to offer and did not need to put forth evidence "beyond the recordings" to demonstrate their inadmissibility.

The evidence presented by Villegas was sufficient to demonstrate that the recordings were inadmissible. If he bore the initial burden, his evidence was sufficient to shift the burden to Appellant to demonstrate their admissibility. If the trial court placed a burden of proof on Appellant at this point, it did not err in doing so.

3. The burden of proving relevance, conditional relevance and hearsay exceptions is on the party offering evidence.

The burden at trial, and thus the burden on Appellant at the hearing (whether it bore that burden initially or it was shifted by Villegas's proof) is on the party offering evidence. "[T]he proponent of evidence ordinarily has the burden of establishing the admissibility of the proffered evidence. If no objection is made, the evidence is generally deemed admissible. However, once an objection is made, the proponent must

demonstrate that the proffered evidence overcomes the stated objection." *Vinson v. State*, 252 S.W.3d 336, 340 (Tex.Crim.App. 2008) (footnotes admitted).

In particular, the proponent of evidence has the burden to establish its relevance. *See Montgomery v. State*, 810 S.W.2d 372, 387 (Tex.Crim.App. 1990). Additionally, "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." TEX.R.EVID. 104(b). The trial court may make preliminary findings when necessary to determine admissibility of evidence. TEX.R.EVID. 104(a); *see Gonzalez v. State*, 195 S.W.3d 114, 125 n. 47 (Tex.Crim.App. 2006).

Much of Appellant's argument is that the recordings should be admitted because they somehow implicate Villegas in a conspiracy to obtain false testimony, which Appellant contends is evidence of his guilt. This theory hinges on the speculative assumptions that a conspiracy existed; that Villegas was a member of the conspiracy; and that the object of the conspiracy was to have witnesses testify falsely. Appellant has repeatedly made these accusations, but they are unsupported by anything in the record. The burden was on Appellant to present evidence supporting its conspiracy theory, to establish relevance. TEX.R.EVID. 104(b). Appellant did not carry its burden of proving this theory.

Another burden imposed on the party offering evidence arises when the proponent of an out-of-court statement seeks to admit it under the hearsay exclusion of Rule 801(e)(2) as a statement by the opposing party's agent, co-conspirator, or as an adoptive admission. *See Alvarado v. State*, 912 S.W.2d 199, 215 (Tex.Crim.App. 1995) ("The State, as the proponent of the evidence, had the burden of proving to the trial court, by a preponderance of the evidence, that ... testimony qualified as an adoptive admission under Rule 801(e)(2)(b)"); *Meador v. State*, 812 S.W.3d 330, 333 (Tex.Crim.App. 1991) (proponent of a statement alleged to fall within the hearsay exclusion for statements by co-conspirators under Rule 801(e)(2) bore the burden to prove the elements of that rule). These are preliminary questions of admissibility for the trial court's determination under Rule 104. *Vinson*, 252 S.W.3d at 340 n. 14; *Alvarado*, 912 S.W.2d at 215. Appellant did not carry its burden of proving these exceptions.

In sum, the record simply does not support Appellant's manufactured complaint of procedural error in the placement of the burden of proof. Whether the burden was on Appellant in the first instance, or shifted to Appellant later, there is nothing in the record to establish that the trial court held it to any burden. Appellant therefore, unsurprisingly, did not object on this basis to preserve any such complaint for appeal. However, Appellant bore the burden under the Rules to establish conditional relevance

and hearsay exceptions. For all of these reasons, this aspect of Appellant's first ground for review provides no basis for reversal.[25]

[25] In a footnote within this argument, Appellant asserts that the issue of the authenticity of some of the recordings was not raised below. (A'nt brf. p. 39 n. 32). To the contrary, this issue was first raised in the trial court by Appellant, which attempted to obtain an advance ruling from Judge Ables on the sufficiency of its affidavit. (8RR:63-64).

IV. The Court of Appeals did not err in finding that the trial court did not abuse its discretion in the evidentiary rulings. (Appellant's ground for review two).

A. The Court of Appeals did not misapply the standard of review. Appellant is effectively seeking *de novo* review, when the abuse-of-discretion standard applies.

It is well-established that a pretrial order excluding evidence is reviewed only for an abuse of discretion. *Mechler*, 153 S.W.3d at 439. The test for whether the trial court abused its discretion is whether its action was arbitrary or unreasonable. *Id.* An appellate court should not reverse a trial judge whose ruling was within the zone of reasonable disagreement. *Id.* at 440.

This discretionary standard applies to rulings based on the Rules at issue. "Questions of relevance should be left largely to the trial court, relying on its own observations and experience, and will not be reversed absent an abuse of discretion." *Moreno v. State*, 858 S.W.2d 453, 463 (Tex.Crim.App. 1993). As this Court explained in *Montgomery*:

> Whether particular evidence meets the definition will not always be cut and dried. Our adversarial system assigns that question to the trial judge, on the assumption that he has the best vantage from which to decide. Determining the relevance of any given item of evidence to any given lawsuit is not exclusively a function of rule and logic. The trial court must rely in large part upon its own observations and experiences of the world, as exemplary of common observation and experience, and reason from there in deciding whether proffered evidence has "any tendency to make the existence of any fact of consequence to the determination of the

> action more probable or less probable than it would be without the evidence." Rule 401, *supra*. ... Reasonable men may disagree whether in common experience a particular inference is available. Where there is room for such disagreement, an appellate court that reverses a trial court's ruling on relevancy accomplishes nothing more than to substitute its own reasonable perception of common experience for that of the trial court. The appellate court effectively displaces the trial court, commandeering a function institutionally assigned elsewhere.
>
> To avoid this anomaly, appellate courts uphold the trial court's ruling on appeal absent an "abuse of discretion." That is to say, as long as the trial court's ruling was at least within the zone of reasonable disagreement, the appellate court will not intercede.

Montgomery, 810 S.W.2d at 391.

Even when evidence has some relevance, the trial court exercises broad discretion in determining whether to admit it or exclude it under Texas Rule of Evidence 403. *Mechler*, 153 S.W.3d at 439. Relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX.R.EVID. 403. This Rule is "inherently discretionary with the trial court," and its language "displays the drafter's intent to vest the trial courts with substantial discretion." *Mechler*, 153 S.W.3d at 439.

Like other evidentiary rulings, the trial court's decision to exclude evidence as hearsay is reviewed only for an abuse of discretion, and can not be overturned in the absence of a clear abuse of discretion. *Saavedra v. State*, 297 S.W.3d 342, 349

(Tex.Crim.App. 2009); *McCarty v. State*, 257 S.W.3d 238, 239 (Tex.Crim.App. 2008). An abuse of discretion occurs only if the trial court's decision lies outside the zone of reasonable disagreement. *McCarty*, 257 S.W.3d at 239.

Appellant's brief pays lip service to the abuse-of-discretion standard of review, but then attacks the trial court rulings based on the standards to be applied by a trial court in the first instance, not the deferential standard of review that must be applied by an appellate court. It argues that each of the recordings it desires to introduce is relevant, rather than discussing whether a reasonable trial court could conclude otherwise. (A't brf. p. 44-50). It touches on the Rule 403 exclusion without fairly addressing the many countervailing factors which a trial court could consider. (A't brf. p. 59-61). Appellant does not demonstrate that the standard of review applied by the Court of Appeals differs from the controlling standard; instead, its argument is that the trial court got it wrong. In effect, Appellant is seeking *de novo* review from this Court of the trial court's rulings. The Court should not accept Appellant's invitation to disregard the controlling standard of review and reconsider the trial court's rulings on a *de novo* basis.

B. The trial court did not abuse its discretion in excluding the jailhouse recordings as irrelevant, or under Rule 403.

1. Relevance and Rule 403 standards

Evidence is relevant if it has a tendency to make a fact that is of consequence in determining the action more or less probable. TEX.R.EVID. 401. "In deciding whether a particular piece of evidence is relevant, a trial court judge should ask 'would a reasonable person, with some experience in the real world, believe that the particular piece of evidence is helpful in determining the truth or falsity of any fact that is of consequence to the lawsuit.'" *Montgomery*, 810 S.W.2d at 391. It is incumbent on the proponent of the evidence to satisfy the trial court of the relevance of proffered evidence. *Id.* at 387.

In determining whether to exclude evidence under Rule 403, the trial court's consideration includes, but is not limited to: the probative value of the evidence and the proponent's need for the evidence; weighed against the potential for the evidence to impress the jury in some irrational yet indelible way; the tendency of the evidence to confuse or distract from the main issues; any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate its probative force; and the time needed to develop the evidence. *Gigliobianco v. State*, 210 S.W.3d 637, 641

(Tex.Crim.App. 2006); *Mechler*, 153 S.W.3d at 440. "Of course, these factors may well blend together in practice." *Gigliobianco*, 210 S.W.3d at 642.

In the context of Rule 403 balancing, "probative value" means more than simply relevance. It encompasses the inherent probative force of the evidence, or how compellingly it serves to make a fact of consequence more or less probable. *Gigliobianco*, 210 S.W.3d at 641; *Mechler*, 153 S.W.3d at 440.

"Unfair prejudice" refers specifically to the tendency of the evidence to tempt the jury into finding guilt on grounds apart from proof of the offense charged. *Gigliobianco*, 210 S.W.3d at 641; *Mechler*, 153 S.W.3d at 440. This consideration asks whether the evidence has the potential to impress the jury in some irrational but indelible way. *Gigliobianco*, 210 S.W.3d at 641; *Mechler*, 153 S.W.3d at 440.

Rule 403 balancing also considers the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense. *Gigliobianco*, 210 S.W.3d at 641; *Mechler*, 153 S.W.3d at 441. This consideration focuses on efficiency of the trial proceeding rather than the threat of an inaccurate decision. *Gigliobianco*, 210 S.W.3d at 641. Because the concern is the jury's distraction from considering the charged offense, this consideration in a Rule 403 balancing considers not only the particular evidence in question, but also related contextual and rebuttal evidence made necessary by that evidence. *Newton v. State*,

301 S.W.3d 315, 321 (Tex.App.–Waco 2009, pet. ref'd) (collecting cases); *Laube v. State*, 2014 WL 2993823 at *8 (Tex.App.–Dallas 2014, no pet.) (memo. op.).

2. Recordings Appellant claims permit an inference of guilt.

The trial court did not abuse its discretion in excluding recordings which Appellant characterizes as supporting an inference of guilt. In recording 2B, Villegas prayed to God to "let me out of here" – he did not state he was "not innocent." The Court may verify this fact by listening to the recording, which is in the record. (October 12, 2011 at 16:36-17:39). Because he did not say what Appellant claims he said, the trial court did not abuse its discretion in finding the recording irrelevant.[26] But even if Appellant's misrepresentation were accepted as true, Villegas's prayer made no reference to the murders he is now accused of. (*Id*.). A reasonable person, with some experience in the real world, would not find this bare reference to the concept of innocence, even if it existed, helpful to determining a fact of consequence. *Montgomery*, 810 S.W.2d at 391.

[26] It appears that even the assistant district attorneys arguing this issue below do not believe that Villegas stated that he was not innocent. In the habeas corpus proceeding, after Villegas obtained the recording and pointed out that Appellant's transcription was wrong, the assistant district attorney argued, "It is not what I am saying the tapes say. It is what a certified court reporter is saying those tapes say." (17CR:6204). And at the hearing on admission of the recordings, the assistant district attorney noted the dispute, and carefully circumscribed his position to be that the State "has a good faith basis to believe" Villegas stated he was not innocent. (9RR:82).

Recording 2A refers to "actual innocence" as a basis for habeas relief, not guilt or innocence of the crime with which he is charged – as Appellant admitted in the trial court. (9RR:79). Whether Villegas should have been granted habeas corpus relief on this basis is not an issue for the jury in the current prosecution. Recordings 2C, 2D and 2E refer to the State twisting Villegas's words, to claim he said something he did not say. Recordings of persons attempting to understand previous statements after they were twisted and misconstrued by an opposing attorney are even further removed from relevance than the original recordings. With recording 2F, Appellant goes so far as attempting to interpret an offhand comment – repeating a statement to another inmate that "you wouldn't be in here if you didn't do something" – as an admission that Villegas committed murder. Nothing about this comment about a different person in a different situation can reasonably be interpreted as an "admission of guilt." None of these statements, made 20 years after the crime was committed, make any reference to the circumstances or facts of the crime. The trial court did not abuse its discretion in determining that a reasonable person, with some experience in the real world, would not believe that they are helpful in determining the truth or falsity of any fact of consequence to this prosecution. *Montgomery*, 810 S.W.2d at 391. Therefore, the court did not abuse its discretion in excluding them as irrelevant.

The trial court also did not abuse its discretion in excluding these recordings under Rule 403. Appellant's only reason for offering them is to attempt to confuse the jury, by arguing that Villegas said something or meant something he did not say. With respect to probative value, even under Appellant's interpretation, Villegas's recitation of his prayer to God did not refer specifically to the crime with which he is charged, and therefore (contrary to Appellant's characterization) it is not an "admission of guilt" of that offense. In the same conversation, Villegas expressed his hope that "they hurry up and give me justice," an odd desire if he is actually believed to have made an "admission of guilt" in the same conversation. (19CR:6852, 6972). Discussions of how an assistant district attorney twisted and misconstrued Villegas's earlier words do not compellingly serve to make any fact of consequence to the homicide prosecution more or less probable; if the recordings discussing the meaning of prior irrelevant statements have any probative value, it is so slight as to be practically nonexistent. Recording 2A has little if any probative value, because (as all parties agreed in the trial court, 9RR:79) it discusses a specific legal concept, "actual innocence" as a basis for habeas corpus relief, and thus is not (as Appellant now argues) "germane to the issue of guilt." These recordings do not "compellingly" serve to make a fact of consequence more probable, and have little if any probative value. *Gigliobianco*, 210 S.W.3d at 641; *Mechler*, 153 S.W.3d at 440.

With respect to unfair prejudice, Appellant's argument reflects that its actual intent with recordings 2B, 2C, 2D, and 2E is to mislead the jury by arguing incorrectly that Villegas made an "admission of guilt." Admitting recording 2A would require introducing evidence to explain to the jury the meaning of "actual innocence" as it is used in the context of habeas corpus relief. Trying this legal concept to the jury, in a case where it is not an issue for the jury to decide, would be confusing and create an irrational impression on the jury, as well as distracting the jury from consideration of the indicted offense. Appellant clearly seeks to misuse recording 2F, stating a different prisoner wouldn't be "in here" if he didn't "do something," to play on a prejudicial assumption that Villegas would not have been incarcerated if he didn't "do something," circumvent the presumption of innocence, and force Villegas to prove he did not commit a crime instead of itself proving that he did so.

Furthermore, admitting any of these recordings would necessarily reveal to the jury that Villegas was convicted and incarcerated. Admitting recordings 2B, 2C, 2D and 2E will require an explanation to the jury of why Villegas prayed to God to "let me get out of here," which will inform the jury of the fact that Villegas was previously convicted of the murders and incarcerated. The argument Appellant desires to make, misrepresenting that Villegas made a confession when he prayed to "let me get out of here, even though I'm not innocent [*sic*]," necessarily reveals to the jury not only that

Villegas was incarcerated, but that he was incarcerated for the specific offense with which he is presently charged. Admitting recording 2A would also require revealing to the jury the fact that Villegas was previously convicted of the offense, so as to explain why he was pursuing habeas corpus relief. Admitting recording 2F, stating a different prisoner wouldn't be "in here" if he didn't "do something" would require revealing to the jury that Villegas was "in here," *i.e.*, in jail. The prior conviction and incarceration of Villegas are highly prejudicial and inadmissible. *See Theus v. State*, 845 S.W.2d 874, 881-82 (Tex.Crim.App. 1992) (recognizing that previous conviction for same type of offense can be highly prejudicial); *Casey v. State*, 349 S.W.3d 825, 835 (Tex.App.–El Paso 2011, pet. ref'd) (that defendant had been incarcerated "was certainly prejudicial and inadmissible under Evidence Rule 403."); TEX.R.APP.P. 21.9(d) (prohibiting reference to previous conviction on retrial for same offense).

Appellant's contention that it will not take long to introduce the recordings ignores the additional contextual and rebuttal evidence that will be required if they are admitted. *See Newton*, 301 S.W.3d at 321. Admitting them will force a "mini trial" on what Villegas said and what he meant. It will require testimony from court reporters about the correct and incorrect transcription, and possibly expert witnesses about the content of the recordings. Admitting claimed admissions of guilt may require Villegas to introduce into evidence the many times he was recorded proclaiming his innocence.

For example, in another recorded conversation with his mother, which Appellant offered to the trial court but does not reference on appeal, they discussed him testifying at the writ proceedings because he has "nothing to hide." (19CR:6956). Admitting a recorded discussion of "actual innocence" in connection with habeas corpus proceedings will require essentially re-trying the habeas corpus proceeding to the jury. The trial court properly considered the time needed to develop this evidence if the recording is admitted, during which the jury would be distracted from considering the underlying offense. *Gigliobianco*, 210 S.W.3d at 641; *Mechler*, 153 S.W.3d at 441; *Newton*, 301 S.W.3d at 321. For all of these reasons, the trial court did not abuse its discretion in excluding these recordings under Rules 402 and 403.

3. References to other potential witnesses.

In recordings designated 3 through 8, speakers made reference to attempting to locate witnesses or their possible testimony in connection with Villegas's habeas corpus proceeding. Appellant largely attempts to admit these recordings under a "consciousness of guilt" theory, claiming that they show a conspiracy[27] to offer benefits to witnesses in exchange for false testimony, from which it infers that Villegas knew he was guilty of the murder with which he was charged. The trial court did not abuse

[27] Appellant has never identified the parties to this alleged conspiracy, and has never presented any evidence to suggest it existed.

its discretion in concluding that Appellant's relevance theory requires such a lengthy chain of assumptions, suppositions, inferences, and leaps of logic that the recordings are properly excluded under Rules 402 and 403.

To the extent Appellant claims that various recordings are relevant because of the existence of a conspiracy to tamper with witnesses or suppress evidence, it bore the burden to prove the existence of that conspiracy, a necessary condition to their relevance. TEX.R.EVID. 104(b) (proponent has burden to prove facts necessary to establish relevance of evidence). It presented no evidence to demonstrate the existence of any conspiracy.

Criminal acts designed to reduce the likelihood of prosecution, conviction, or incarceration may be admissible as evidence of guilt, as an exception to Rule 404(b)'s general exclusion of extraneous-offense evidence. *Ransom v. State*, 920 S.W.2d 288, 299 (Tex.Crim.App. 1994). However, the consciousness-of-guilt exception does not require admission of evidence when the proponent must stack inference upon inference to establish an attenuated theory of relevance. *Nolen v. State*, 872 S.W.2d 807, 812 (Tex.App.–Fort Worth 1994), *pet. ref'd*, 897 S.W.2d 789 (Tex.Crim.App. 1995).

For example, in *Nolen*, the defendant was charged with possession of methamphetamine. In order to prove that the defendant knew that the substance in his possession was a controlled substance, the State introduced evidence that the defendant

previously had been convicted of burglary, and that the burglary conviction involved theft of glassware typically used in manufacturing amphetamine drugs. The State's theory was that the defendant intentionally stole glassware used in drug production in the prior offense; therefore, he had knowledge of the contraband and its production; therefore, he knew he was possessing contraband in the offense charged. The Court of Appeals held that this chain of inferences was too attenuated, and the trial court abused its discretion in admitting the prior conviction to show the defendant's guilty knowledge. *Nolen*, 872 S.W.2d at 812.

The chain of inferences, assumptions, and speculation argued by Appellant is even more attenuated than that offered in *Nolen*. Appellant's consciousness-of-guilt theory requires speculation that Mimbela contacted witnesses, offered them benefits, or made them aware of the outstanding reward money in order to change their testimony, rather than to learn what their testimony would be and obtain information that might lead to the conviction of the real killer. There is no evidence to support this speculation. It is contrary to Appellant's acknowledgment in the trial court that there is nothing wrong with offering a reward. (9RR:49). It is contrary to what is stated in the recordings, which indicate only that Mimbela was trying to find the truth and was looking for evidence of the real killer. There is nothing in the record to demonstrate any *quid pro quo* with any witness, much less that the exchange involved false

testimony from any witness. Villegas did not engage in the conduct described, Mimbela did. Mimbela's belief as to whether or not Villegas is innocent does not provide evidence of Villegas's belief. Therefore, to consider these events as evidence of Villegas's state of mind also requires an assumption that Villegas was somehow able to cause Mimbela to offer a reward or other benefits in exchange for a change in a witness's testimony. Nothing in the record establishes that this existed. For Mimbela's offer of a reward to have relevance also requires speculation that Mimbela offered the reward in a capacity as agent or conspirator of Villegas. There is nothing in the record to support Appellant's conspiracy theory. Appellant's consciousness-of-guilt theory also requires an assumption that Villegas knew about Mimbela's intent to offer benefits in exchange for favorable testimony; but the recordings generally just report events that happened in the past, not a decision or plan to do so in the future. This chain of unsupported inferences and speculation is necessary to lead to the final inference Appellant wishes to draw, that Villegas caused Mimbela to offer benefits in exchange for altered testimony because Villegas himself believes he is guilty.

Simply talking about finding a potential witness, discussing what a witness has stated or may testify to, or hoping that a witness will identify the true perpetrator, is not evidence of a conspiracy to tamper with that witness's testimony. The trial court did not abuse its discretion in finding that a reasonable person, with experience in the real

world, would not find these recordings helpful in determining any fact of consequence, and therefore excluding them as irrelevant. *Montgomery*, 810 S.W.2d at 391; *Nolen*, 872 S.W.2d at 812.

The trial court also did not abuse its discretion in rejecting other relevance theories asserted in Appellant's brief. Appellant argues that the evidence is admissible to rebut a defensive theory that the Flores brothers were alternative perpetrators. Appellant provides little explanation of this theory of relevance. Two of its transcriptions refer to Villegas's personal opinions of Rudy. In the November 1, 2010 recording, according to Appellant, Villegas stated that Rudy is "sheisty" and hopes he will come out with it "if he wasn't the triggerman." (A'nt COA brf. p. 119). In the February 6, 2011 recording, according to Appellant, Villegas stated "he seemed like a big coward to me," but in the context of that transcription, it is unclear whether he is speaking of Rudy or Javier. (A'nt COA brf. p. 121). Of course, Villegas was not present at the time of the shootings, so he has no personal knowledge to establish whether it was Rudy or Javier who committed them; and the record does not reflect the foundation for his opinions of their personalities. Villegas's personal opinions of the personalities of Rudy and/or Javier shed no light on whether or not they were actually the perpetrators of the offense. The trial court did not abuse its discretion in finding that a reasonable person, with experience in the real world, would not find these

recordings helpful in determining whether Rudy or Javier committed the shootings, and therefore excluding them as irrelevant. *Montgomery*, 810 S.W.2d at 391.

Appellant argues that the recordings rebut a defensive theory because they show that Villegas was not joking or bragging when he told Rangel his "creative story," or that Rangel did not think so at the time. But nothing in the recordings reflect such an understanding, and Appellant's brief does not explain how any of the words stated in these recordings reflect on whether or not Villegas was joking or bragging in the story he told Rangel, or what Rangel believed about it. Appellant's brief states that Villegas became a suspect only after Rangel's statement. (A'nt brf. p. 2). It is therefore perfectly consistent for Villegas and his family to blame Rangel for the prosecution of Villegas, or to be angry with him because of the resulting prosecution of an innocent man. The trial court did not abuse its discretion in finding that a reasonable person, with experience in the real world, would not find these recordings helpful in determining any fact of consequence, and therefore excluding them as irrelevant. *Montgomery*, 810 S.W.2d at 391.

Even if the recordings have some minimal relevance, the trial court did not abuse its discretion in excluding them under Rule 403. If they have any probative value, it is slight – these references to various witnesses do not compellingly suggest that Villegas took any action to tamper with their testimony or was "conscious of guilt," or

any other relevant fact. However, admitting these recordings in support of Appellant's theory will hijack the trial of this homicide prosecution and turn it into a trial of Villegas and Mimbela for allegedly conspiring to tamper with witnesses. The trial court did not abuse its discretion in perceiving that there is a great potential for unfair prejudice and for tempting the jury into finding guilt for a reason other than evidence of the charged offense, and that the proceedings in this case will be unnecessarily delayed while that accusation is tried.

In addition, Appellee does not believe the recordings can be published to the jury in a way that will not cause the jury to perceive that Villegas was previously convicted of this crime and incarcerated for it, which is obviously prejudicial to Villegas.[28] Explaining why Villegas was discussing the possible testimony of various witnesses also would require explaining the habeas corpus proceedings, which also necessarily involves disclosing that he was previously convicted. Mimbela got involved only because he came to believe Villegas had been wrongly convicted. (19CR:6839). There is no way to explain his discussions of witnesses with Villegas, and respond to

[28] Although this prejudice applies to all of the conversations, it is most evident for those designated 7 and 8. Appellant's concocted theory that Villegas is angry at Williams and Gonzalez because he is in prison can not be presented to the jury without revealing that Villegas was convicted and incarcerated. Explaining why Villegas and his family members may have been angry with Rangel would likewise necessarily reveal that Villegas has previously been convicted.

Appellant's concocted conspiracy theory, without explaining why Mimbela is involved in the case, thus necessarily revealing that Villegas was convicted. The conviction is inadmissible and obviously prejudicial to Villegas. *Theus*, 845 S.W.2d at 881-82; *Casey*, 349 S.W.3d at 835.

Moreover, the admission of these recordings under a "consciousness of guilt" theory may require Villegas to present as rebuttal the many times he was recorded stating that he was not guilty. Appellant's "need" for the recordings, based on its recognition that it does not possess substantial evidence that Villegas actually committed the offense with which he is charged, is not sufficient basis to overturn the trial court's discretionary balancing under Rule 403. Considering all the factors outlined in *Gigliobianco* and *Mechler*, *supra*, the trial court did not abuse its discretion in excluding these recordings under Rule 403.

4. References to the prior judge.

The recordings designated 9A, 9B and 9C refer to the former judge. The trial court did not abuse its discretion in excluding them as irrelevant. It is unsurprising that a convicted person, having filed a petition for writ of habeas corpus, would have conversations about the judge. Judge Ables characterized this type of conversation as "jailhouse talk" and "gossip." (8RR:27, 35). The trial court did not abuse its discretion in finding that a reasonable person, with experience in the real world, would not find

recordings of Mimbela's general impression of Judge Bramblett or his desire to make her aware of Congressman Reyes's support of Villegas, as suggested by another sitting judge, helpful in determining any fact of consequence, and therefore excluding them as irrelevant. *Montgomery*, 810 S.W.2d at 391.

Appellant's "consciousness of guilt" theory does not demonstrate an abuse of discretion by the trial court. That theory depends on a chain of inferences and speculation: It requires speculation that Mimbela was committing some wrongdoing by attempting to make Judge Bramblett aware of Congressman Reyes's support, even though Judge Herrera recommended this course of action, and informed him that it is common. It requires the jury to speculate that Mimbela believed such action would result in Judge Bramblett deciding the case on anything other than the merits, instead of simply encouraging her to keep an open mind, even though Judge Herrera actually described such letters as encouraging judges to look closely at cases. Nothing in the record supports this speculation. Villegas did not engage in the conduct at issue, Mimbela did. Mimbela's belief is not evidence of Villegas's consciousness. Thus, for Mimbela's attempt to communicate with the judge to have relevance to Villegas's guilt also requires speculation that Mimbela acted in a capacity as agent or conspirator of Villegas. There is no evidence establishing any such agency relationship or conspiracy. To be evidence of Villegas's consciousness requires further speculation that Villegas

had some ability to control or cause Mimbela to convey this information to Judge Bramblett. Nothing in the record establishes that this existed. All of these leaps are necessary to reach Appellant's final inference that Villegas's consciousness of his own guilt motivated him to cause Mimbela, as his agent or conspirator, to attempt to influence Judge Bramblett to decide the case on some grounds other than the merits by making her husband aware of Congressman Reyes's support, at Judge Herrera's suggestion. Because Appellant's theory relies on such an attenuated chain of speculation and inferences, the trial court did not abuse its discretion in concluding that a reasonable person, with some experience in the real world, would not find these recordings helpful in determining the truth or falsity of any fact of consequence to the prosecution of Villegas, and therefore excluding them as irrelevant. *Montgomery*, 810 S.W.2d at 391; *Nolen*, 872 S.W.2d at 812.

The trial court also did not abuse its discretion in excluding these recordings under Rule 403. Any possible probative value of recordings describing Mimbela's opinion of Judge Bramblett or attempt to make her aware of Congressman Reyes's support, which did not discuss the offense with which Villegas is charged, is slight. They do not compellingly suggest that Villegas committed the underlying offense, or is conscious of his guilt of the offense, or any other relevant fact. However, admitting these recordings in support of Appellant's theory will hijack the trial of this homicide

prosecution and turn it into a trial of Villegas and/or Mimbela for conspiring to influence Judge Bramblett, and even worse, a trial on whether the Texas judiciary can be so easily influenced. Moreover, the admission of these recordings under a "consciousness of guilt" theory may require Villegas to present as rebuttal the many times he was recorded stating that he was not guilty. It will require Villegas to dedicate time to introducing the recordings establishing that all he wanted was a fair trial instead of a trial before a judge who already had her mind made up. The trial court did not abuse its discretion in perceiving that there is a great potential for unfair prejudice and for tempting the jury into finding guilt for a reason other than evidence of the charged offense, and that the proceedings in this case will be unnecessarily delayed while Appellant's accusations unrelated to the merits of the underlying offense are tried. Admitting these recordings will require some explanation to the jury of the role of Judge Bramblett, and Appellee does not believe they can be published to the jury in a way that will not cause the jury to perceive that Villegas was previously convicted in Judge Bramblett's court and was incarcerated, which is inadmissible and obviously prejudicial to Villegas. *Casey*, 349 S.W.3d at 835; *Theus*, 845 S.W.2d at 881-82; TEX.R.APP.P. 21.9(d). Balancing all the factors outlined in *Gigliobianco* and *Mechler*, *supra*, the trial court did not abuse its discretion in excluding these recordings under Rule 403.

C. The grounds presented in Appellant's petition for discretionary review do not provide a basis for reviewing the trial court's exclusion of recordings as hearsay.

In its brief, Appellant argues that the Court of Appeals erred in upholding the trial court's exclusion of recordings as hearsay. (A'nt brf. p. 50-59). However, its grounds for review do not state a basis for reviewing the merits of the hearsay rulings. (P.d.r. p. 1; A'nt brf. p. 1). In the absence of a ground for reviewing the hearsay ruling, the Court should not address this argument, and the hearsay rulings should be left undisturbed. *See* TEX.R.APP.P. 68.4(g).

In a transparent attempt to evade this omission, Appellant characterizes the Court of Appeals' decision as affirming a relevance determination on the basis that the recordings are hearsay. (A'nt brf. p. 50). Obviously, relevance and hearsay are different concepts. TEX.R.EVID. 402, 802. Hearsay is inadmissible regardless of whether it is "relevant" hearsay. *See Bigby v. State*, 892 S.W.2d 864, 888 (Tex.Crim.App. 1994) ("Because the written statement was inadmissible hearsay, we need not address appellant's argument that the document was relevant."); *see generally Renteria v. State*, 206 S.W.3d 689, 697 (Tex.Crim.App. 2006) (recognizing that evidence may be otherwise objectionable even if it meets a standard of relevance). Appellant's grounds for review provide no basis for reviewing the trial court's hearsay rulings. The trial court's exclusion of the recorded statements of persons other than

Villegas (recordings designated 2D, 3A, 3B, 3C, 3D, 3E, 3F, 4A, 4B, 4C, 4D, 4E, 5A, 5B, 5C, 5G, 6A, 6B, 6C, 7B, 7C, 8A, 9A, 9B, and 9C) should therefore not be reviewed.

D. The trial court did not abuse its discretion in excluding the jailhouse recordings as hearsay.

If the Court chooses to reach the merits of this argument, however, it should find that the Court of Appeals did not err in concluding that the trial court did not abuse its discretion in excluding the recordings as hearsay.

Appellant seems to argue that Villegas did not object to the admission of the recordings on the basis that they are hearsay. This is incorrect. Throughout the hearing, Villegas stated hearsay objections to the recordings. (9RR:34, 36, 44, 51, 58, 64, 71, 76, 77, 94). The hearsay nature of Mimbela's recorded statements was also discussed at the previous hearing, before Judge Ables. (8RR:34). Appellant never objected in the trial court that hearsay was not in issue, or that it was unprepared to establish that the out-of-court statements were admissible under a hearsay exception; nor did it present any issue in the Court of Appeals arguing that the trial court should not have excluded statements as hearsay because there was not an objection on this ground. Any such complaint by Appellant is not preserved for review, and this sidebar

complaint to the hearsay rulings does not provide a basis for reversing the trial court's hearsay rulings.

The trial court did not abuse its discretion in excluding statements of persons other than Villegas as hearsay. Many of the statements are "double hearsay" or "hearsay within hearsay," i.e., the recordings consist of speakers repeating what was stated in an unrecorded out-of-court conversation.[29] Such a statement is inadmissible unless a hearsay exception is established for the statement that is being repeated. TEX.R.EVID. 805. "Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule." *Id*. "When hearsay contains hearsay, the Rules of Evidence require that each part of the combined statements be within an exception to the hearsay rule." *Sanchez v. State*, 354 S.W.3d 476, 485-86 (Tex.Crim.App. 2011). Appellant has never offered any basis for admission of these statements repeating unrecorded hearsay.

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[29] Specifically, the recordings designated 3C [Mimbela repeats purported statements of Wayne Williams], 3E [same], 3F [same], 4B [Mimbela repeats purported statement of Hernandez], 4D [same], 4E [same and/or Rocio], 5C [Mimbela repeats purported statement of Villegas's attorney], 5D [Villegas and Yolanda talk about what "he" or "they" purportedly said they were planning to do], 5G [Yolanda repeating what she was purportedly told about Rudy meeting with Villegas's attorney], 7B [Yolanda repeating what Mimbela purportedly told her], 8A [Mimbela repeats purported statement of Rangel], 8B [Villegas repeats purported statements of Rangel and Yolanda], 9C [Mimbela repeats purported statement of probation officer]).

Appellant argues that some or all of the recordings were not hearsay because they were "not offered for the truth," and criticizes the Court of Appeals for finding this contention waived. However, in the trial court, Appellant merely made a general statement that one question in a single one of the recordings had "no truth value," after the trial court had already made its ruling on the admissibility that recording (9RR:98), and did not argue that any of the other recordings were not offered for the truth of the matter asserted. (9RR:1-98). The Court of Appeals was correct in finding this contention waived. TEX.R.APP.P. 33.1; *Mercado*, 972 S.W.2d at 78 (preservation-of-error requirement applies to State); *Davis v. State*, 1996 WL 112156 at *1 (Tex.App.–Beaumont 1996, pet. ref'd) (not desig. for publication) (trial court erred in admitting hearsay when the State did not articulate purpose for offering it apart from the truth of the matter asserted at the time the evidence was offered).

Even if preserved, however, the mere "assertion by the proponent of an out-of-court statement that it is offered for some purpose other than to prove the truth of the matter asserted does not render the statement automatically admissible." *Miller v. State*, 2003 WL 253326 at *1 (Tex.App.–Waco 2003, pet. ref'd) (not desig. for publication) (citation omitted); *see also DuBose v. State*, 774 S.W.2d 328, 329 (Tex.App.–Beaumont 1989, pet. ref'd) (rejecting argument that hearsay objection could be overruled merely because State argued that evidence was not offered for the truth).

When an out-of-court statement is objected to, it is incumbent on the party propounding the evidence to articulate how it is relevant apart from the truth of the matter asserted, not just claim it is not offered for the truth. *Moreno*, 858 S.W.2d at 465.

Appellant fails to explain how the recordings are relevant apart from the truth of the matter asserted. The "matter asserted" includes any matter a declarant explicitly asserts; and any matter implied by a statement, if the probative value of the statement as offered flows from the declarant's belief about the matter. TEX.R.EVID. 801(c). An out-of-court statement is offered to prove the truth of the matter asserted if it is relevant only to the extent the factfinder believes it to be true and accurate. *Cardenas v. State*, 971 S.W.2d 645, 650 (Tex.App.–Dallas 1998, pet. ref'd). "If the only relevance of an out-of-court statement is to prove, expressly or impliedly, the truth of the matter asserted, it is hearsay even though the proponent asserts that it is offered to prove only the fact that the statement was made." *Miller*, 2003 WL 253326 at *1.

Thus, in *Cardenas*, the trial court abused its discretion in admitting an out-of-court statement that blamed the defendant for a shooting. The State argued that the statement was not offered for the truth, but to explain why the police did not arrest the person who made the statement. However, that explanation could only be relevant if the out-of-court statement was true. Therefore, the statement was inadmissible hearsay, despite the State's claim that it was offered for another purpose. *Cardenas*, 971 S.W.2d

at 651. *See also Lozano v. State*, 359 S.W.3d 790, 820 (Tex.App.–Fort Worth 2012, pet. ref'd) (statement purportedly offered to impeach credibility of medical examiner rather than for its truth was nonetheless hearsay, because it was relevant only if the trier of fact believed the statement was true); *Watson v. State*, 917 S.W.2d 65, 68-69 (Tex.App.–Fort Worth 1996, pet. ref'd) (document purportedly offered to show notice to trial court rather than for the truth was hearsay, because it was relevant only if true).

The same is true of the recordings in this case; they have no relevance unless they are believed to be true. For example, the recording in Appellant's Issue 3A describes Mimbela's efforts to find an unidentified individual, who Appellant asserts was Wayne Williams. (A'nt COA brf. p. 86-87). Appellant argues that this statement is offered to show that Villegas, through Mimbela, allegedly attempted to influence Wayne Williams' testimony; but this relevance theory requires a finding that Mimbela's statements were true: If Mimbela was not truly trying to find Wayne Williams, the statements have no relevance under Appellant's theory. Because the relevance of the out-of-court statements hinges on the truth of the matter asserted, they are hearsay.[30]

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[30] *Johnson v. State*, cited by Appellant, is not to the contrary. That case held that a non-prosecution affidavit which a witness declined to sign was not hearsay, because it was not offered for the truth of the matter asserted. *Johnson v. State*, 425 S.W.3d 344, 346 (Tex.App.–Houston [1st Dist.] 2011, pet. ref'd). This holding concerned only the non-prosecution affidavit, not statements about or conversations with the witness. *Id*.

Lozano, 359 S.W.3d at 820; *Cardenas*, 971 S.W.2d at 650-51; *Watson*, 917 S.W.2d at 68-69. Therefore, despite Appellant's protestations, the recordings are actually offered for the truth of the matter asserted, and are hearsay.

To avoid the hearsay rule, Appellant argues that Mimbela and other persons are either Villegas's agents, or he adopted their statements, or they are his co-conspirators. The party offering out-of-court statements bears the burden to establish these hearsay exceptions by a preponderance of the evidence. *Alvarado*, 912 S.W.2d at 215; *Meador*, 812 S.W.3d at 333.

Appellant claims that Villegas and Mimbela conspired to commit the offense of witness tampering under Penal Code § 36.05, and to improperly influence the judge. In the Court of Appeals, it argued that unspecified others were members of the alleged conspiracy; its argument in this Court seems to be limited to Villegas and Mimbela. No conspiracy existed. The burden of proof was on Appellant to establish the conspiracy. *Meador*, 812 S.W.3d at 333 (the proponent of a statement alleged to fall within the hearsay exclusion for statements by co-conspirators under Rule 801(e)(2) bore the burden to prove the elements of that rule). To meet its burden, the proponent cannot rely only on the statements at issue themselves; it must present independent evidence to establish a prima facie case of conspiracy separate and apart from the otherwise hearsay statements. *P. McGregor Enterprises, Inc. v. Hicks Const. Group,*

LLC, 420 S.W.3d 45, 54 (Tex.App.–Amarillo 2012, no pet.). "Where there is sufficient ***independent evidence*** to establish a conspiracy, hearsay acts and statements of a conspirator which are made during the course of and in furtherance of the conspiracy are admissible against another conspirator." *Deeb v. State*, 815 S.W.3d 692, 696 (Tex.Crim.App. 1991) (emphasis added, citations omitted). Appellant's brief in the Court of Appeals agreed that evidentiary development beyond the recordings themselves is necessary to show the existence of a conspiracy. (A'nt COA brf. p. 60). But Appellant failed to offer any such evidence. (9RR:1-98).

The co-conspirator exemption of the hearsay rule is a "very narrow" exemption. *Byrd v. State*, 187 S.W.3d 436, 440 n. 7 (Tex.Crim.App. 2005) (citation omitted). The proponent of evidence must show that a conspiracy existed, and that the opposing party and the declarant were members of the conspiracy. *Guidry v. State*, 9 S.W.3d 133, 148 (Tex.Crim.App. 1999). Expanding indefinitely the vague crime of conspiracy can constitute "a serious threat to fairness in our administration of justice." *Byrd*, 187 S.W.3d at 444 (citation omitted). The trial court did not abuse its discretion in concluding that no conspiracy was proven.

The record is devoid of evidence to support Appellant's conspiracy theory. In order to prove the existence of a conspiracy, Appellant was required to prove the intent that a felony be committed, and an agreement between co-conspirators to commit that

offense, plus the performance of an act in furtherance of the agreement. *Williams v. State*, 646 S.W.2d 221, 222 (Tex.Crim.App. 1983); *Rivas v. State*, 473 S.W.3d 877, 886 (Tex.App.–San Antonio 2015, pet. ref'd) (elements of conspiracy); *see Agyin v. State*, 2013 WL 5864483 at *4 (Tex.App.–San Antonio 2013, pet. ref'd) (memo. op.) (following Penal Code elements in applying Rule 801). The mere fact that two people are in the same place at the same time does not prove a conspiracy. *Morris v. State*, 2003 WL 195009 at *6 (Tex.App.–El Paso 2003, no pet.)(not desig. for publication).

Despite repeatedly making the accusation, Appellant points to no evidence that Villegas reached an agreement with Mimbela or anybody else to tamper with witnesses, suppress evidence, or commit any other crime. There is nothing wrong with interviewing witnesses. There is nothing wrong with attempting to learn information. There is nothing wrong with attempting to obtain truthful testimony from witnesses. As Appellant agreed in the trial court, there is nothing wrong with offering a reward for truthful testimony. (9RR:49). Despite Appellant's accusations, none of the recordings indicate that Villegas or anybody on his behalf asked anybody to testify untruthfully, or attempted to tamper with any witness, nor that Villegas agreed with anybody on this course of action. The trial court did not abuse its discretion in concluding that Appellant failed in its burden to prove the existence of an agreement to commit an offense, and therefore excluding hearsay statements by persons other than Villegas.

Appellant also did not establish other elements necessary for admissibility under the exclusion for statements by co-conspirators. The Rule is based on the rationale that a conspiracy is a common undertaking, where the conspirators are all agents of each other, so the acts and statements of any one can be attributed to all. *Byrd*, 187 S.W.3d at 440. It therefore attempts to provide limited guarantees of trustworthiness by limiting the exemption to statements made both during the course of, and in the furtherance of, the conspiracy. *Id.*; TEX.R.EVID. 801(e)(2)(E). These are separate elements. *Guidry*, 9 S.W.3d at 148; *Meador*, 812 S.W.3d at 333.

Statements made after the objectives of the conspiracy have failed or have been achieved do not meet the requirement that the statement was made "during" the conspiracy. *Byrd*, 187 S.W.2d at 440 n. 7 (citation omitted). Post-conspiracy statements, even if they are made in an effort to cover up the first conspiracy, are not admissible under the Rule. *Id.* at 441-42; *Deeb*, 815 S.W.3d at 696-97. Appellant has done nothing to establish when the alleged conspiracy began and ended. Therefore, it did not establish that any statements were made during the conspiracy.

To show that the statements were made in furtherance of the conspiracy, those statements must be calculated to advance the objectives of the conspiracy. *Guidry*, 9 S.W.3d at 148; *Deeb*, 815 S.W.3d at 697-98; *Meador*, 812 S.W.2d at 333-34; *see generally Byrd*, 187 S.W.3d at 443. For example, statements eliciting assistance,

cooperation, or information to be used in the conspiracy may advance its objectives. *Guidry*, 9 S.W.3d at 148. However, a statement merely describing what is occurring or what occurred, or reporting the status of the conspiracy, is not a statement in furtherance of a conspiracy. *Id.* Appellant has failed to explain how the statements in the recordings at issue could have advanced the objectives of the alleged conspiracy. Therefore, it did not establish that any statements were made in furtherance of the claimed conspiracy. For all of these reasons, Appellant's conspiracy theory does not remove the out-of-court statements from the operation of the hearsay rule.

Appellant alternatively argues that statements by Mimbela are admissible under Rule 801(e)(2)(D) on the theory that he was Villegas's agent. The law does not presume an agency relationship. *Elizondo v. State*, 382 S.W.3d 389, 395 (Tex.Crim.App. 2012) (in different context). The burden of proof was on Appellant to establish this hearsay exclusion by a preponderance of the evidence. *Alvarado*, 912 S.W.2d at 215; *Meador*, 812 S.W.3d at 333 (both recognizing proponent's burden under other subsections of Rule 801(e)(2)); *Song v. State*, 2015 WL 631163 at *5 (Tex.App.–El Paso 2015, no pet.) (not desig. for publication) (as proponent of evidence, State bore burden to prove admissibility of translator's statements as agent of defendant under this Rule). Appellant's brief in the Court of Appeals admitted that

evidence outside the recordings is necessary to establish the existence of an agency relationship. (A't COA brf. p. 60). It offered no such evidence. (9RR:1-98).

Appellant's theory appears to be that Mimbela was Villegas's agent because his actions benefitted Villegas. However, this is not the test for establishing an agency relationship. To be an agent, a person must work for a principal and be subject to his control. *Ackley v. State*, 592 S.W.2d 606, 608 (Tex.Crim.App. 1980). This control test has been applied specifically in the context of determining whether a declarant is a party's agent for purposes of the hearsay exclusion of Rule 801. *Farlow v. Harris Methodist Fort Worth Hosp*., 284 S.W.3d 903, 927-28 (Tex.App.–Fort Worth 2009, pet. denied) (statement not admissible under agency exemption, where plaintiff "could not testify as to any indicia of control or agency relationship"); *Vahlsing Christina Corp. v. Ryman Well Serv., Inc*., 512 S.W.2d 803, 812 (Tex.Civ.App.–Corpus Christi 1974, writ ref'd n.r.e.) ("The basic test is the right to control.").

Federal courts interpret Federal Rule of Evidence 801 the same way. *Ramsey v. Gamber*, 469 Fed.Appx. 737, 741 (11th Cir. 2012) ("this hearsay statement is also not admissible against [defendant] as a statement by 'a party's agent or servant' because the evidence shows that weight-room assistants were not under [defendant's] control and direction and thus were not [defendant's] agents or servants"); *Kirk v. Raymark Indus., Inc*., 61 F.3d 147, 164 (3rd Cir. 1995) (expert witness's statements are not admissible

under this hearsay exclusion as statements by agent of client, because "the expert has not agreed to be subject to the client's control"); *Sanford v. Johns-Manville Sales Corp.*, 923 F.2d 1142, 1149 (5th Cir. 1991) (same, applying Texas-law test for agency). This Court has followed federal court interpretations in applying Texas Rule of Evidence 801. *See, e.g., Gonzalez*, 195 S.W.3d at 125 n. 47; *Byrd*, 187 S.W.3d at 440. Unless Villegas had a right to control Mimbela, Mimbela was not Villegas's agent.

Appellant presented no evidence that Villegas had any right to control Mimbela. (9RR:1-98). Therefore, Mimbela was not his agent, and Mimbela's statements are not admissible as statements by an agent under this hearsay exclusion.

Additionally, agency status alone is not sufficient to permit admission of the agent's hearsay statements against the principal. The statements must also be made on a matter within the scope of the agency relationship, and while it existed. TEX.R.EVID. 801(e)(2)(D). Since the scope and duration of any agency relationship are not established, Appellant also failed to establish these elements of the hearsay exclusion. For all of these reasons, the trial court did not abuse its discretion in concluding that Appellant failed in its burden to prove that any statements were made by Villegas's agents, and excluding hearsay statements.

Appellant also argues that statements by Mimbela, Yolanda, or Mimbela's family members should be admitted against Villegas as adoptive admissions under Rule

801(e)(2)(B). This Rule excludes from the definition of hearsay statements that an opposing party "manifested that it adopted or believed to be true." TEX.R.EVID. 801(e)(2)(B). The burden of proof was on Appellant to establish the elements of this exclusion in order to allow admission of these statements. *Alvarado*, 912 S.W.2d at 215 ("The State, as the proponent of the evidence, had the burden of proving to the trial court, by a preponderance of the evidence, that ... testimony qualified as an adoptive admission under Rule 801(e)(2)(b)").

Despite invoking this exclusion, Appellant's brief provides little explanation of how it believes Villegas manifested that he adopted or believed a statement by anybody else to be true. Appellant's interpretation of this exclusion appears to be so broad that it would remove from the definition of hearsay anything heard by an opposing party, unless the party immediately objected to it. The trial court listened to the recordings, and therefore had the opportunity to base decisions on Villegas's tone and inflection as well as the words used. (9RR:5). It did not abuse its discretion in concluding that Villegas's muted reactions to the statements of others, generally such innocuous comments as "yeah" and "alright," fail to demonstrate that he manifested that he adopted or believed the truth of those statements. TEX.R.EVID. 801(e)(2)(B); *see United States v. Sanchez-Soto*, 617 Fed.Appx. 695, 697 (9th Cir. 2015) (reaction "Oh, okay. Well, so," did not make another's statement admissible as an adoptive

admission, when these words "reveal little of his intent to adopt" and "could have just as readily indicated his mere acknowledgment that he heard the statement, not that he was acceding to its truth"). If the trial court's decision on whether Villegas's innocuous reactions manifested his adoption or belief in the truth of statements to him falls within the "zone of reasonable disagreement," it may not be reversed. *Paredes v. State*, 129 S.W.3d 530, 534-35 (Tex.Crim.App. 2004). Appellant has not shown that the trial court abused its discretion in finding Appellant failed to carry its burden to prove that the recordings represent adoptive admissions by Villegas.

For all of these reasons, the trial court did not abuse its discretion in excluding statements by persons other than Villegas as hearsay. If the Court reaches the merits of Appellant's hearsay complaints, they should be overruled.

CONCLUSION AND PRAYER

Appellant lacks substantial evidence that Villegas committed the crime with which he is charged. Therefore, it resorts to misstating and misconstruing excerpts from recorded conversations, speculative and incorrect interpretations of those recordings, and unwarranted accusations. The trial court did not abuse its discretion in excluding the recordings from evidence. The appeal should be dismissed on jurisdictional grounds, or the trial court's orders affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that this pleading was served on **Jaime Esparza**, El Paso District Attorney, Attn: **Lily Stroud** (lstroud@epcounty.com), and **Tom Darnold** (tdarnold@epcounty.com), Assistant District Attorneys, Attorneys for Appellant; and to the **State Prosecuting Attorney** (information@SPA.texas.gov); on August 17, 2017, by electronic service.

/s/ John P. Mobbs
John P. Mobbs

WORD-COUNT CERTIFICATE

This brief contains 30,954 words, excluding the parts of the brief exempted by Tex.R.App.P. 9.4(i)(1). Contemporaneously with the filing of this brief, Appellee is filing a motion for leave to exceed the word limits of Rule 9.4.

/s/ John P. Mobbs
John P. Mobbs

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0053-17

THE STATE OF TEXAS,

Appellant,

v.

DANIEL VILLEGAS,

Appellee.

Appealed from the 409th Judicial District Court
And the Court of Appeals for the Eighth District of Texas
El Paso, Texas

APPENDIX OF APPELLEE
DANIEL VILLEGAS

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1 August 16, 2012 Findings of Fact and Conclusions of Law on Application for Writ of Habeas Corpus (13CR:4378-4455).

2 Nov. 3, 2014 Findings of Fact and Conclusions of Law on Motion to Suppress (22CR:7683-98).

3 State's Notice of Appeal (22CR:7842-44).

APPENDIX 1

IN 409th DISTRICT COURT
OF EL PASO COUNTY, TEXAS

THE STATE OF TEXAS	§	
	§	
VS.	§	**CAUSE NO. 76187-41-1**
	§	
DANIEL VILLEGAS	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ON THIS THE 16TH DAY OF AUGUST, 2012, Comes the 409th District Court and after hearing and consideration of all evidence presented, all submissions, affidavits, the transcripts of the two prior trials, as well as all other evidence before this Court in this matter, submits to the Court of Criminal Appeals the following Findings of Fact And Conclusions of Law:

I. FINDINGS OF FACT

A. Findings of Fact Related to the Investigation of the Double Homicide of Armando Lazo and Robert England.

1. Shortly after midnight on April 10, 1993, Jesse Hernandez, Juan Medina, Armando Lazo, and Robert England were walking home from a party on Jamaica Street in El Paso, Texas. They reached the intersection of Transmountain Road and Electric Street, seventeen-year-old Lazo and eighteen-year-old England were struck and killed by gunfire originating from the passenger side of a vehicle on Electric Street. Hernandez and

Medina were not struck. (WH Pet. Ex. 43, 46; T1 12/7/94, 16, 121, 126).[1]

2. Robert England suffered a single gunshot wound to the head and died shortly thereafter. His body was discovered approximately 148 feet from six .22-caliber bullet casings that were later found grouped together on Electric Street. (T1, 12/7/94, 73-74, 97-98, 108-10, 186-88).

3. Armando Lazo was shot once in his abdomen and once in his thigh, with both bullets entering the front of his body. His body was found on the doorstep of the corner home belonging to George and Nancy Gorham, directly behind from where the shots originated. The Gorhams called 911 at 12:18 a.m. after hearing five or six consecutive gunshots and the sound of someone knocking at their front door. They did not report hearing a second round of shots fired after the initial five or six. Except for the cluster found on Electric Street, no shell casings were found near the Gorhams' door or anywhere else in the vicinity. (WH, 9/8/11, 114, 130-33; WH Pet. Ex. 32a-31, 61; T1, 12/7/94, 48).

4. Two weeks before the shooting, fifteen-year-old Rudy Flores, an LML gang member who was known as "Dust," had a confrontation with Robert England and Armando Lazo at a party, during which time he threatened to kill Lazo and waited outside to fight him. Rudy's older brother, twenty-year-old Javier Flores, who was known as "Dirt," also had confrontations with Armando Lazo and fought him at school. Rudy Flores had a car that was similar to the one described by the surviving victims. (WH, Pet. Ex. 30, 35, 43).

5. Just hours after the shooting, in an investigative interview conducted by Detective Arbogast of the El Paso Police Department, Juan Medina told the police the following:

    a. As the four boys were walking down Transmountain Road, a car approached them, stopped, backed up, moved forward, and stopped again. Believing that the car belonged to a friend of theirs named Hector Ochoa whom they had just seen at the party, the boys

[1] Citations to the record appear with an abbreviation for the proceeding, followed by the date of testimony and the corresponding page number. A citation to WH, 6/21/11, 40, for instance, refers this Court to page 40 of the portion of the Writ Hearing held on June 21, 2011. Similarly, T1 refers to Daniel Villegas' first trial in December 1994, T2 refers to Villegas' second trial in August 1995, and SH refers to the Pre-trial Motion to Suppress hearing held in December 1994. Citations to different documents in the record are separated by semicolons.

approached the vehicle; the car, however, continued this cat-and-mouse pattern until it eventually drove off. (T1, 12/7/94, 11, 14).

b. Shortly thereafter, as the four boys were walking on Electric Street, the same car approached, parked on the wrong side of the street, and turned off its lights. When the four boys again approached the car, shots were fired from the car's passenger side. Medina and Hernandez began running as the gunshots continued and were not struck. (T1, 12/7/94, 13-16).

c. Medina told Detective Arbogast that he could not identify the shooter or any other individuals in the car. (T1, 12/7/94, 15-16).

6. That same day, April 10, 1993, the other surviving victim, Jesse Hernandez, was interviewed at Police Headquarters by Detective Alfonso Marquez of the El Paso Police Department, who was leading the investigation. During this interview, Hernandez described facts about the events leading up to the shooting similar to the facts that Medina relayed, and also stated that he could not identify the shooters. Hernandez added that the car in question was red or maroon. (WH, 6/22/11, 20-22, 24-25, 31-32, 37, 52-53; WH 9/8/11, 24; WH Pet. Ex. 24).

7. On April 10th, 1993, later in the evening, gunshots were reported on Shenandoah Street in close proximity to the scene of the Electric Street shooting. Officer Bellows was the first responding officer to both of the shootings. Rudy Flores was present during the Shenandoah Street shooting. In addition, a .22-caliber weapon was recovered by police in connection with the Shenandoah Street shooting. This weapon was never tested against the .22-caliber casings recovered from the Electric Street shooting earlier that day. The recovered weapon was destroyed by the El Paso Police Department five (5) years after it was taken into evidence. (WH, 9/8/11, 135-43; WH, Pet. Ex. 50).

8. On April 12, 1993, Jesse Hernandez was brought back to the police station by Detective Marquez for further questioning, where the following occurred:

a. Detective Marquez asked Hernandez to write out a description of the events leading up to and including the Electric Street shootings. While Hernandez was writing, Marquez took the statement, told

him to "just cut the bullshit," and threw the statement back at Hernandez. (WH, 6/22/11, 54).

b. Detective Marquez accused Hernandez of killing his friends and lied to him by telling Hernandez that Juan Medina had already implicated him. (WH, 6/22/11, 54).

c. Detective Marquez threatened Hernandez that if he didn't confess, he would go to jail and get the death penalty. (WH, 6/22/11, 55).

d. Hernandez did not confess to the crime. However, during the evidentiary portion of this writ hearing, Hernandez testified that he was close to confessing to the killing of his friends based on Detective Marquez's interrogation.

9. Shortly after the shooting, Tonya Vinson, Terri Vinson, Charles Blucher, and Terrance Farrar all contacted the police to alert them that they believed Rudy and/or Javier Flores were responsible for shooting Lazo and England. (WH, Pet. Ex. 43).

10. At 4:25 p.m. on April 14, 1993, Javier Flores gave a statement to the police indicating that he lived with Rudy Flores, and that when Javier arrived home at approximately 12:30 a.m. on the evening of the Electric Street shooting, Rudy was not home. (WH, Pet. Ex. 35).

11. Approximately one-and-a-half hours later on April 14, 1993, Detective Marquez took a statement from Rudy Flores, which included the following information:

a. Rudy Flores drove past the same party the victims were at on Jamaica Street at approximately 11:00 p.m. on the night of the murder.

b. At around midnight, Rudy Flores was in a car traveling east on Transmountain Road.

c. Between 12:15-12:20 a.m., Rudy Flores was in the same car near Transmountain and Electric Street (the location of the shooting).

d. Rudy Flores claimed he then went home. His home was located just one or two minutes away from the scene of the Electric Street shooting.

(WH, Pet. Ex. 34). This information placed Flores at the scene of the crime at the time of the shooting, which occurred shortly before the Gorhams called 911 at 12:18 a.m.

12. On April 15, 1993, based on a tip, Detective Marquez participated in the arrest, transport from New Mexico to El Paso, and subsequent questioning of fifteen-year-old Michael Johnston. The circumstances of this questioning were as follows:

a. Detectives Marquez and Graves interrogated Michael Johnston for eight hours from 7:00 p.m. on April 15 until 3:00 a.m. on April 16, 1993.

b. Johnston was handcuffed during the entire eight hours and was unaccompanied by his parents.

c. Detective Marquez accused Johnston of shooting Lazo and England and lied to him that Johnston's friend had implicated him.

d. Detective Marquez threatened Johnston with the electric chair if he did not confess, promising to pull the switch himself.

e. Detective Marquez further threatened to take Johnston to jail where he would be molested and raped if he did not confess, but he promised to let Johnston off easy if he did confess.

f. Johnston confessed to shooting Armando Lazo and Robert England.

g. Johnston was never charged with this offense. Detective Marquez later admitted that Johnston's confession was false. (T1, 12/8/94, 312, 317; T1, 12/9/94, 596, 598-99; WH, 9/8/11, 41; WH, 9/9/11, 4-7; WH, Pet. Ex. 49).

13. During the investigation, several other individuals confessed to or boasted of committing the Electric Street shooting but were not charged,

including Rick Martinez, Eddie Valles, and Jacob Jarequi. (T1, 12/8/94, 317; WH, 9/14/11, 29; WH, Pet. Ex. 43).

14. On April 21, 1993, the El Paso Police Department contacted Patricia Rangel, telling her they needed to speak to her seventeen-year-old son David Rangel regarding a telephone harassment complaint that had been filed against him and threatening her with obstruction of justice if she did not cooperate. (T1, 12/9/94, 696). David Rangel is Daniel Villegas' cousin. Rangel was subsequently picked up by investigating detectives and questioned at the police station by Detectives Marquez and Lozano. (T1, 12/8/94, 146; WH, 6/22/11, 113). The circumstances of this questioning were as follows:

    a. David Rangel was never questioned about a telephone harassment complaint. The sole topic discussed was the shooting on Electric Street.

    b. Detective Marquez accused Rangel of committing the murders and lied to him that others had already implicated him in the shooting.

    c. Detective Marquez threatened Rangel with life in prison if he did not confess and warned him that he was a "pretty white boy with green eyes" who could expect to be "fucked" in prison.

    d. During the questioning, David Rangel told the detectives that during a telephone call with his cousin Daniel Villegas and Marcos Gonzalez, Villegas admitted to shooting at the victims on Electric Street with a shotgun. Rangel told the detectives that Villegas and Gonzalez were laughing during the conversation and Rangel believed Villegas was joking.

    e. Rangel testified he wrote a statement documenting this phone call with Villegas and Gonzalez, wherein he noted that Villegas had admitting shooting at the victims with a sawed-off shotgun.

    f. Detective Marquez, after reading the statement, threw it in the garbage and told Rangel it was "not correct" that Villegas used a shotgun.

g. Rangel testified that Detective Marquez ordered him to sign another statement that purported to document the phone conversation but that did not mention the type of gun used. Marquez threatened that if Rangel did not sign the new statement, he would be charged with the crime and would not be released. Rangel signed the statement, explaining that he was willing to sign "pretty much what was in front of" him as he was "just [wanting] to get out of there." (WH, 6/22/11, 118-36).

15. David Rangel's signed statement documenting Villegas' purported involvement included several facts that are directly contradicted by other evidence in this case, including:

    a. That Villegas was in a black car, whereas the surviving eyewitness victims variously described the car as red, maroon, or "goldish." (WH, Pet. Ex. 24, 26, 51).

    b. That Villegas shot Lazo once, saw Lazo run to a nearby home, and then "chased him to the house and there shot him again," even though no shell casings were recovered near Lazo's body or anywhere else other than the location on Electric Street from which Hernandez and Medina said the shots originated. (WH, Pet. Ex. 26; WH, 9/8/11, 212-14).

    c. That on the initial drive-by, Villegas ordered one of the victims to stop, at which point the victim stopped and "threw his gang sign" at Villegas. Surviving eyewitnesses Jesse Hernandez and Juan Medina did not describe any verbal exchange or hand gestures on the initial encounter. (WH, Pet. Ex. 26, T1, 12/5/94, 38-39).

    d. That Villegas chased Lazo down and personally shot him again, which directly conflicts with Villegas' purported confession, in which he said someone else shot Lazo the second time. (WH, Pet. Ex. 26).

16. On April 21, 1993, fifteen-year-old Rodney Williams was questioned by El Paso Police. Detective Earl Arbogast was the first to question Williams; he concluded his questioning after determining Williams had nothing relevant to add to the investigation. (WH, 6/21/11, 26; WH, 6/23/11, 10-11).

17. Detective Graves then began questioning Williams. The circumstances of this questioning were as follows:

    a. Fifteen-year-old Williams was alone and without counsel during the five-to-six hour interrogation. He asked to see his mother but Detective Graves refused these requests.

    b. Detective Graves insisted that he knew Williams was involved and present when Villegas shot Lazo and England on Electric Street; Williams maintained that neither he nor Villegas were involved.

    c. Williams told Detective Graves that he and Villegas had been watching movies at the Village Green apartment complex on the night of the murders.

    d. Detective Graves threatened that, if Williams did not admit his involvement, he would be charged and go to jail. He told Williams that he would be raped so often and so brutally that his rectum would enlarge and he would not be able to "fart."

    e. Detective Graves promised Williams he could go home if he did give an inculpatory statement. Detective Graves also promised Williams that they wanted to prosecute Villegas, and they were not interested in going after Williams.

    f. Williams signed a typed statement prepared by officers, despite the fact that the information in the statement was untrue. (WH, 6/23/11, 13-30; T1, 12/8/94, 250-51).

18. The statement Rodney Williams signed contained the following details relating to the homicides on Electric Street:

    a. Williams, Villegas, and Marcos Gonzalez were at the Village Green Apartments during the late evening hours of April 9, 1993 when "Popeye" and "Snoopy" picked them up in a white, mid-sized car. Popeye then drove the five boys around the area.

b. Thereafter, Villegas and Gonzalez got out of the car and stole a case of Budweiser beer (i.e., "a beer run") from a Diamond Shamrock, which the five boys then drank together.

c. Sometime thereafter, with Popeye still driving the car, they approached a group of four boys walking on Transmountain Road. Popeye yelled "Que Barrio?", at which point two of the boys approached the car and started yelling in response. Popeye then drove off.

d. Fifteen minutes later, Popeye drove up to the same group of boys, handed Villegas a gun, and Villegas shot at the boys. One fell down right away, while the others ran away. Williams stated that he believed that another was shot in the back as he was running away. (WH, Pet. Ex. 29).

19. After signing the statement, Rodney Williams was arrested for capital murder, but charges against him were dropped after the prosecutor announced in open court that they had insufficient evidence to charge him. (WH, 6/23/11, 35, 38; T1, 12/8/94, 253-54).

20. Shortly after 10:00 p.m., on April 21, 1993, Detectives Marquez and Arbogast entered the Villegas home armed with an arrest warrant obtained approximately forty minutes earlier for Marcos Gonzalez. Gonzalez, an adult, was placed under arrest and read his rights. As the detectives were leaving, Daniel Villegas asked them why they were arresting Gonzalez. After learning the identity of Villegas, Detective Marquez placed him under warrantless arrest and read him the same rights. Villegas was sixteen years old at the time. (WH, 9/15/11, 28, 31; WH, Pet. Ex. 46; SH, 130, 227).

21. Villegas and Gonzalez were placed in different police cars. Both police cars then drove past the home of Fernando Lujan, who is known by the nickname "Droopy." The officers specifically pointed this house out to Villegas. (WH, 9/15/11, 29-30; SH, 12/1/94, 158).

22. While in the car, officers asked Villegas if he knew someone named "Snoopy," and Villegas said he did not. (WH, 9/15/11, 30).

23. Both of the police cars then drove to Northpark Mall. While Villegas and Gonzalez stayed in the police cars, the officers met and spoke to each other. (WH 9/15/11, 31; SH 12/1/94, 152, 223).

24. After this meeting, both Gonzalez and Villegas were driven directly to the El Paso Police Headquarters. During this drive, Villegas repeatedly informed Detective Marquez that he was a juvenile. Detective Marquez accused Villegas of lying about his age. About 10-15 minutes after arriving at Police Headquarters, Detective Marquez confirmed that Villegas was, in fact, just sixteen years old. At that point, Detective Marquez told Villegas he was a "lucky punk" and transported him to Juvenile Investigative Services, which is a "juvenile processing office" pursuant to Tex. Fam. Code §52.05(a). (WH, 9/15/11, 31, 33; SH, 12/1/94, 224-25).

25. Marcos Gonzalez, an eighteen-year-old, remained at Police Headquarters, where he was questioned by Detective Graves. The circumstances of this questioning were as follows:

    a. Gonzalez testified that Detective Graves threatened to beat him if he did not confess to the Electric Street shooting. Detective Graves also promised to put Gonzalez in county jail where he would be "screwed by fat, old men" unless he confessed.

    b. Detective Graves promised Gonzalez that he was only interested in going after Villegas for the killings.

    c. Gonzalez testified that when he refused to confess, Detective Graves slammed him against the wall repeatedly.

    d. At 1:15 a.m., Gonzalez signed a statement typed by law enforcement. (T1, 12/8/94, 433, 436, 446, 452, 489; SH, 12/30/94, 41; WH, Pet. Ex. 56).

26. Marcos Gonzalez's signed statement contained the following details relating to the homicides on Electric Street:

    a. Gonzalez and Williams were outside Williams' apartment on the evening of the shooting "kicking back." A beige, two-door car approached them. "Snoopy" was driving the car, "Popeye" was in

the front passenger seat, and Villegas was in the back. Gonzalez and Williams got in the back of the car.

b. They then stopped at a 7-Eleven, where Popeye went on a "beer run," stealing four twelve-packs of Budweiser.

c. The group drank approximately three of the twelve-packs while driving around. Eventually, they passed a group of four or five teenage boys walking on Transmountain Road.

d. Popeye and Villegas yelled "VNE Putos" at the boys, and the other group yelled something back. Snoopy then drove off toward his home, saying he wanted to go get his gun.

e. Snoopy pulled up outside his house and went in, returning a short time later with a small black automatic gun.

f. As they drove back toward Transmountain Road, Gonzalez asked to be let out of the car. Snoopy did so, but not before Popeye called him a "pussy" and Gonzalez hit him.

g. Gonzalez walked home and went to sleep. Later, Villegas told Gonzalez that he had shot and killed Armando Lazo. (WH, Pet. Ex. 56).

27. Detective Marquez arrived with Villegas at the Juvenile Investigative Services office at approximately 11:00 p.m. Villegas was placed in a room and handcuffed to a chair by Detective Marquez. (SH, 227; WH, 6/21/11, 42-43; WH, 9/15/11, 33-35; WH, Pet. Ex. 5).

28. Villegas signed a juvenile *Miranda* warning card in front of Detective Ortega after arriving at the office at 11:15 p.m. (WH, 6/21/11, 206-07; WH, Pet. Ex. 3, 4; T1, 12/8/94, 378).

29. Villegas was questioned by Detective Marquez while at Juvenile Investigative Services. Villegas testified at the evidentiary hearing to the following:

a. Villegas remained handcuffed to a chair while he was questioned for about an hour.

b. Detective Marquez repeatedly accused Villegas of committing the Electric Street shooting, telling him that Rodney Williams had implicated him.

c. Detective Marquez threatened Villegas that if he did not confess, he would be put in county jail to be "raped and fucked by a bunch of fat faggots."

d. Detective Marquez also threatened to "kick his ass" and to take him to the desert and beat him if he did not admit to the shooting.

e. When Villegas maintained his innocence, Detective Marquez slapped him. Villegas had never been interrogated before and was "terrified out of his mind." (WH, 9/15/11, 35-36; T1, 12/12/94, 813-18).

30. Villegas was next handcuffed and taken to the Juvenile Probation Department, where Officer Mario Aguilera documented his intake at 12:26 a.m. and wrote that Villegas had agreed to "give a confession." (WH, 6/21/11, 212; SH, 11/30/04, 20; WH, Pet. Ex. 6).

31. Officer Aguilera met privately with Villegas, at which point Villegas agreed to give a statement. (WH, 6/21/11, 224).

32. Villegas was next taken before Magistrate Carl Horkowitz, who was required to warn him of his rights prior to any interrogation.

33. Prior to this meeting, Villegas testified that Detective Marquez warned Villegas that if he did not agree to give a statement, he would beat him and put him in jail. Specifically, Detective Marquez threatened: "You are going to tell the judge that you are going to make a statement and if you don't you already know what I am going to do to you, motherfucker. I am going to take you to the desert and beat your ass." (WH, 6/21/11, 56-57; WH, 9/15/11, 39).

34. At 12:53 a.m., Villegas did tell Magistrate Horkowitz that he would give a statement. Villegas testified that he did so only because he was "mentally paralyzed" by Detective Marquez's continual threats. (WH 9/15/11, 38-39).

35. Villegas was then driven back to Juvenile Investigative Services, where he was handcuffed and questioned once again by Detective Marquez. Villegas also testified that after being told by Marquez that Williams had already implicated him, Villegas then told Detective Marquez the following while Detective Marquez typed into the statement:

    a. On the night of the murder, Villegas and Williams were at the Village Green Apartments, when they were approached by a group of black males with a gun.

    b. Williams alone left with the black males, telling Villegas that he was going to do "something crazy."

    c. Williams returned later and told Villegas that he had killed Lazo and England. (WH, 9/15/11, 40).

36. After Villegas finished this story, Villegas then testified that Detective Marquez took the paper from the typewriter, crumpled it up, and slapped Villegas. Detective Marquez then threatened Villegas that he would pull the switch on the electric chair himself if Villegas did not confess to being the shooter. (WH, 9/15/11, 40-41).

37. Villegas then testified Detective Marquez then waved Williams' statement at Villegas and told him that Williams had named "Snoopy" and Marcos Gonzalez as accomplices. Villegas told Detective Marquez that he did not know anyone named "Snoopy," although he did know someone nicknamed "Droopy." (WH, 9/15/11, 44).

38. Villegas testified Detective Marquez then left the room, but returned shortly thereafter to tell Villegas that Marcos Gonzalez had also implicated Villegas as the shooter. (WH, 9/15/11, 46).

39. Villegas agreed to sign a one-page statement prepared by Detective Marquez, which included the following details:

    a. Villegas, Marcos Gonzalez, Rodney Williams, Popeye and Droopy were together in Popeye's white, mid-size car on the evening of the shooting.

b. Popeye was driving, Droopy was in the front passenger seat, Villegas was in the back behind Droopy, Williams was seated next to Villegas in the back, and Gonzalez was next to Williams in the back behind Popeye.

c. They stopped for a "beer run" at Diamond Shamrock, where they stole two 24-pack cases of beer. Villegas served as a lookout during the "beer run."

d. After the boys drank one case of beer, Popeye drove them down Transmountain Road, where they saw four other boys, including Armando Lazo, walking along the side of the road.

e. Droopy yelled "Que Vario" out the window at the boys, and the four boys on the street hollered something back.

f. Villegas was then handed a small black gun.

g. Popeye drove back to the scene and stopped the car. Lazo approached and said "What's up? What's up?"

h. Villegas fired one shot in the air to scare the boys on the street, followed by more shots aimed directly at the group of four boys.

i. Someone in the car yelled that Lazo was getting away and we needed to "finish him off."

j. "Someone" then "finished [Lazo] off." Villegas did not name himself as the one who "finished him off." (WH, St. Ex. 1).

40. Detective Marquez finished typing the statement at 2:26 a.m. on April 22, 1993. Villegas was then taken back to Magistrate Horkowitz where after being given *Miranda* warnings again, he signed the confession at 2:40 a.m.. (WH, St. Ex. 1).

41. While Detective Marquez was interrogating Villegas at JIS, he would take breaks and speak with Detective Graves, who was simultaneously re-interrogating Marcos Gonzalez at Police Headquarters. During these conversations, Detective Graves learned that pertinent facts in Daniel Villegas' statement conflicted with Gonzalez's first signed statement.

Detective Graves' testimony during the evidentiary hearing was that he was in contact with Detective Marquez during this time period. (T1, 12/8/94, 494; T2, 8/24/95, 473).

42. Gonzalez ultimately signed a second statement. (WH, St. Ex. 56; T1, 12/8/94, 432-34).

43. Gonzalez's second statement was typed by Detective Graves and conflicted with his first statement in the following ways:

44. The following differences were in Gonzalez' statement:

First Statement	**Second Statement**
a . The driver of the car was "Snoopy"	The driver of the car was "Popeye"
b. The front passenger was "Popeye"	The front passenger was "Droopy"
c. Gonzalez was not present at the shooting	Gonzalez was at the shooting

(WH Pet. Ex. 56; WH St. Ex. 1; WH, 9/15/11, 44).

45. Gonzalez's second statement are consistent with the details in Villegas' signed statement. (WH, Pet. Ex. 56; WH, St. Ex. 1).

46. Gonzalez's second statement includes additional new details regarding what he witnessed during the shooting. Each of these details is consistent with Villegas' signed statement. (WH Pet. Ex. 56; WH St. Ex. 1).

47. Marcos Gonzalez was charged but never prosecuted for any crime related to the Electric Street shooting. (T1, 12/8/94, 473).

48. Daniel Villegas' signed confession contained details that are demonstrably false and factually impossible in the following ways:

a. The boy identified as "Popeye" was incarcerated at the time of the offense; he therefore was not driving the car involved in the shooting.

b. The boy identified as "Droopy" was under house arrest at the time of the shooting; he was therefore not in the passenger seat at the time of the murder, nor did he yell "Que Barrio" at the victims.

c. No beer was stolen at Diamond Shamrock on the evening of the shooting; therefore, there was no "beer run" committed by the group of boys. (WH, 9/8/11, 153-54, 195; WH, 9/15/11, 59).

49. Rodney Williams' signed statement contained the same demonstrably false and factually impossible details. (WH, Pet. Ex. 29).

50. Both of Marcos Gonzalez's statements contained the same demonstrably false and factually impossible. Additionally, no beer was stolen from the 7-Eleven at Hondo Pass and Railroad on the evening of the murders, as indicated in Gonzalez's second statement.

51. Daniel Villegas' signed confession also conflicts with other evidence in the case in the following ways:

a. The color of the vehicle used in the shooting:
   i. Villegas statement: white (WH, St. Ex. 1).
   ii. Other evidence:
      1. *Surviving victim Jesse Hernandez*: maroon or red (WH, Pet. Ex. 24).

      2. *Surviving victim Juan Medina*: goldish (WH, Pet. Ex. 51).

      3. *David Rangel's statement documenting Villegas' alleged confession*: black (WH, Pet. Ex. 26).

      4. *Gonzalez's first statement:* beige (WH, Pet. Ex. 56).

b. Where the demonstrably false beer run occurred:
   i. Villegas statement: Diamond Shamrock at Dyer near the Village Two Apartments (WH, St. Ex. 1).

   ii. Other evidence: Marcos Gonzalez's first statement says the beer run occurred at 7-Eleven at Hondo Pass and Railroad. (WH, Pet. Ex. 56).

c. First interaction with the four victims:

i. Villegas statement: Upon seeing the victims, Droopy yelled from the car, "Que Vario." (WH, St. Ex. 1).

ii. Other evidence:

1. *Surviving victim Jesse Hernandez*: Someone from the car yelled "Que Putos." (WH, Pet. Ex. 24).

2. *Surviving victim Juan Medina*: Someone from the car yelled "come here." (WH, Pet. Ex. 51).

3. *Rodney Williams' statement*: Popeye, not Droopy, yelled "Que Barrio." (WH, Pet. Ex. 29).

4. *Marcos Gonzalez's second statement*: Villegas, not Droopy or Popeye, yelled "VNE Putos." (WH, Pet. Ex. 56).

d. The shooting of Armando Lazo

i. Villegas statement: After the initial gunshots from the car, the perpetrators chased after Lazo, "finishing him off" while he was running away toward the home of the Gorhams. (WH, St. Ex. 1).

ii. Other evidence:

1. No additional shell casings were recovered beyond the six found together on Electric Street.

2. Neither the Gorhams, Hernandez, nor Medina reported seeing or hearing a new set of gunshots after the initial five or six shots.

3. Lazo had no entrance wounds to the back, suggesting he was not shot again, or "finished off," while running away. (WH, 9/8/11, 130-33, 205-06, 212-15; WH, Pet. Ex. 61; T2, 8/24/95, 167-68).

52. Daniel Villegas recanted his confession to Monica Sotelo, a juvenile probation officer, as soon as he was away from Detective Marquez. Villegas told Probation Officer Sotelo that "he didn't do it," and that he

only confessed because "the cops were harassing him." "Tired and want[ing] to go back to sleep, [he] told them what they wanted to hear." (WH, Pet. Ex. 42).

53. Neither the vehicle nor the gun used in the crime was ever located as part of the police investigation into the Electric Street shooting. (WH, 9/8/11, 202; WH, St. Ex. 1; WH, Pet. Ex. 26, 29, 56).

54. In the days following the shooting and prior to the statements of Villegas, Gonzalez, Williams, and Rangel, the local media reported on the shooting, including articles that were published in the El Paso Times on April 11, April 13, and April 18, 1993. See Gordon Dickson, *2 Teens Gunned Down Leaving Party*, El Paso Times, April 11, 1993, at 1A; Joe Olvera, *Beaumont Reviews EMS Call*, El Paso Times, April 13, 1993, at 1A; Gordon Dickson, *Help Police Find Suspects Who Shot and Killed Teens*, El Paso Times, April 18, 1993 at 7B (collectively, the "El Paso Times articles").

55. Daniel Villegas had seen these newspaper articles and discussed them with his friends, including David Rangel and Marcos Gonzalez. (T1, 12/7/94, 153-55; T1, 12/8/94, 423).

56. At some point during the investigation, an exculpatory tape recording was made in which a witness divulged the identity of a killer that was not Daniel Villegas, as well as the location of the .22-caliber gun used in the murders. This tape went missing before trial and has never been found. Detective Marquez was aware of, and listened to, the tape. (WH, 9/9/11, 24-27; WH, Pet. Ex. 92; T2, 8/24/95, 9-11, 499-502).

B. Findings of Fact Related to Daniel Villegas' First Trial.

57. Villegas' first trial for capital murder began on December 5, 1994, 592 days after his arrest on April 21, 1993. The State was represented by prosecutors Jamie Esparza and John Williams. Villegas was represented by retained counsel Jaime Olivas. (T1, 12/5/94, 1-2).

58. Each side gave opening statements. Olivas' opening statement highlighted the flaws in the State's evidence, namely that the details in the signed statements contradicted other evidence in the case or were demonstrably false; that the detectives who obtained the statements had a

pattern of using intimidation and illegal interrogation tactics, and had done so against Villegas; and that Villegas was particularly vulnerable to these tactics because he was mentally slow. Olivas also suggested that Rudy Flores had a motive to commit the crime and that his car matched the description given by one of the surviving victims. (T1, 12/5/94, 1-12).

59. The State presented the testimony of the surviving victims – Jesse Hernandez and Juan Medina – and of the Gorhams to explain the circumstances of the shooting. None of them were able to identify the assailants or anyone in the car. (T1, 12/7/94, 3-51).

60. The State presented the testimony of several responding officers, crime technicians, forensic officers, and the medical examiner. Through direct and cross-examination, none of these witnesses were able to connect Daniel Villegas, Rodney Williams, Marcos Gonzalez, Popeye," "Snoopy," or "Droopy." (T1, 12/7/94, 51-119, 130-43, 183-198).

61. The State presented the testimony of David Rangel and asked that he be treated as an adverse witness because it "knew he was going to deny" his previous statement to police. Rangel did not deny his previous statement. Specifically, Rangel testified that Villegas did claim responsibility for committing the shooting on Electric Street with a sawed-off shotgun during a telephone conversation with Rangel; Rangel, however, knew Villegas was kidding. (T1, 12/7/94, 144, 145-82).

    a. On cross-examination, Olivas elicited from Rangel that Villegas often "talked shit" and pretended to have committed crimes in which he actually had no involvement. Olivas also elicited from Rangel that he knew that Villegas had read the El Paso Times articles. (T1, 12/7/94, 178-79, 180).

62. The State called Rodney Williams even though he informed state representatives at least a week prior to trial that his statement to police was coerced and untrue. Williams testified regarding the circumstances of his questioning. Williams further testified that his statement, in which he had implicated himself and Villegas in the Electric Street shootings, was entirely false. Williams also provided an alibi for himself and Villegas, testifying that the two of them, as well as Marcos Gonzalez, were with "Linette" and Williams' brother from 10:15 p.m. to 12:30 a.m.

on the evening of the shooting. They were babysitting two girls and watching the movie "White Men Can't Jump." (T1, 12/8/94, 205-73).

a. On cross-examination, Olivas elicited from Williams that all of the details in his signed statement to police were fed to him by his interrogators. Olivas also elicited the details of the threats. Williams also testified that neither he, Gonzalez, nor Villegas owned a red, maroon, or goldish car. (T1, 12/8/1994, 244-60, 246).

63. The State called Marcos Gonzalez. Gonzalez corroborated the alibi as testified to by Rodney Williams, including the name of the movie they watched. He further testified on direct examination that the statement he signed at the police station was not true, and he only signed the two statements because they were "beaten out" of him. (T1, 12/8/94, 399-478, 436, 440).

a. On cross-examination, Olivas elicited testimony regarding the detailed threats made to Gonzalez during his interrogation. Olivas also elicited that Gonzalez did not even know the meaning of certain words in the statements he signed and that the details in Gonzalez's signed. Olivas further elicited from Gonzalez the details in his confession that were demonstrably false. (T2, 12/8/94, 445-61).

64. The State also called Detective Marquez, Detective Graves, the juvenile officers involved in the interrogations, and the magistrate judge. Through Detective Marquez, the State introduced into evidence Villegas' signed statement, which Marquez and the juvenile officer denied was obtained through any threats, promises, or other illegal interrogation tactics. Detective Marquez also denied ever stopping at Northpark Mall prior to taking Villegas to Juvenile Investigative Services. He also denied the allegations made by David Rangel during his testimony. Detective Graves, who took Gonzalez's two statements and Williams' statement, also denied using any illegal or coercive interrogation tactics. (T1, 12/8/94, 274-396, 481-539).

a. On cross-examination, Olivas pointed to many other alternative suspects in this case, including others who confessed to the offense and the Flores brothers. Olivas also highlighted the demonstrably false details in the statements of Villegas, Gonzalez, and Williams.

Indeed, Detective Marquez admitted on cross-examination that Popeye could not have been involved in this crime. Olivas also elicited that allegations of perjury had been made against Detective Marquez, and that Detective Graves had been the subject of an internal affairs investigation. (T1, 12/8/94, 324-25, 448; T1, 12/9/94, 501-02, 676-80).

65. In short, as the State itself remarked in closing argument, the State's entire case against Daniel Villegas revolved around the four alleged out-of-court statements given by David Rangel, Marcos Gonzalez, Rodney Williams, and Daniel Villegas, each of which had been disavowed prior to trial. (T1, 12/12/94, 52, 58-62).

66. During the defense case, Olivas put on eighteen witnesses to support (1) an alibi defense; (2) that the signed statements were made as a result of police intimidation and illegal and coercive interrogation tactics used on the particularly vulnerable Villegas and Williams; and (3) that the signed statements were entirely unreliable because they included demonstrably false details and conflicted with other evidence.

67. Priciliano Villegas, Lesley Williams, Veronica Ramirez, Sally Williams, Linette Moore, and Daniel Villegas himself were all called to testify in support of Villegas' alibi, which was initially established by Gonzalez and Williams on direct examination (T1, 12/8/1994, 243, 452-460; T1, 12/9/1994, 657, 713-20; T1, 12/12/94, 774-77, 789-90, 802, 806-10; WH, Pet. Ex. 59).

68. A series of witnesses established that Detective Marquez has exhibited a pattern of using illegal interrogation tactics, including in this case, and committing perjury, including:

    a. Michael Gibson and Bruce Weathers, both practicing attorneys in El Paso, testified that Detective Marquez has a reputation for untruthfulness. Gibson, a former First Assistant Chief Felony Prosecutor and Director of the Organized Crime Unit in El Paso, actually twice presented a perjury indictment to the grand jury against Marquez. (T1, 12/9/1994, 550-80; T1, 12/12/1994, 786).

    b. Michael Johnston, as well as his mother Barbara Hoover, testified that Detective Marquez used illegal interrogation tactics leading to

Johnston's own false confession to the Electric Street murders. (T1, 12/ 9/1994, 587, 589).

c. Detective Marquez himself was recalled and testified that he had been the subject of a number of Internal Affairs investigations. He also testified that there have been roughly thirty citizen complaints against him. (T1, 12/9/94, 678-80).

d. Daniel Villegas testified to the threats made to him by Detective Marquez during the interrogation, and the other surrounding circumstances of his interrogation. (T1, 12/12/94, 813-23).

69. Patricia Rangel, the mother of David Rangel, testified that David did not go voluntarily to the police station but instead went because police falsely told him that they wanted to question him about a telephone harassment complaint. This testimony was consistent with David's testimony and contradicted Detective Graves' testimony. (T1, 12/9/94, 696-97; WH, Pet. Ex. 38).

70. Several witnesses were called to demonstrate that Daniel Villegas had a particular vulnerability to falsely confessing under coercive police interrogation and had at times pretended that he had done things, including criminal acts, that he did not really do, including:

a. Priciliano Villegas, Daniel Villegas' adopted father, testified that Villegas has a learning disability, reads poorly, and dropped out of school in seventh grade. He described Villegas as impressionable, easy to trick, someone who thought more like a child than an adult, and tells people what they want to hear. He also testified that Daniel Villegas was "hyper" and prone to boasting. (T1, 12/9/94, 647-49, 651-52, 655).

b. Patricia Rangel, who is the aunt of Villegas and had known him his whole life, testified that he was prone to boasting and exaggeration. (T1, 12/9/94, 701, 704-06).

c. Dr. Angel Marcelo Rodriguez-Chevres, a forensic psychiatrist who conducted a court-ordered psychiatric evaluation of Villegas, testified that Villegas likely had a learning disability, attention deficit disorder, emotional problems, and possible mild mental

retardation, all of which could make him impulsive and a poor decision-maker. Dr. Rodriguez-Chevres also testified that there is a "strong possibility" that these traits could make Villegas easily influenced by a police interrogation. (T1, 12/12/94, 742-50; WH, Pet. Ex. 72).

71. Sally Williams, Rodney Williams' mother, testified that her son was easily scared and manipulated by people, and that he would say anything to the police if they demanded it. (T1, 12/12/94, 792-93).

72. Olivas elicited testimony to prove that several details in Villegas' signed statement were demonstrably false or inconsistent with the crime scene, including:

    a. Paula Masters testified that she is the owner of the local Diamond Shamrock, and after reviewing her store's records, she found that no beer had been stolen from her store at the date and time in question. She also testfied that her employees are required to report whenever merchandise has been stolen, and none did so that evening. (T1, 12/12/1994, 771).

    b. Lesley Roy Williams, the brother of Rodney Williams, testified that neither Villegas, Gonzalez, nor Williams had a maroon, red, or goldish car. (T1, 12/9/94, 722-23). This was also established during the cross-examination of David Rangel. (T1, 12/7/94, 179).

73. Olivas gave a lengthy closing argument, spanning thirty-four pages of transcript, arguing that Villegas was not guilty based on (1) the alibi, (2) the evidence supporting that the interrogators used illegal tactics and intimidation to secure the statements, and (3) that the statements were unreliable because of the lack of corroborating evidence and the contradictory and demonstrably false details. (T1, 12/12/94, 15-50).

74. The evidence and arguments concluded on December 12, 1994. The jury hung and the trial court declared a mistrial on December 14, 1994.

C. Findings of Fact Related to Daniel Villegas' Second Trial.

75. Villegas' second trial for capital murder began on August 21, 1995. The State was again represented by prosecutor Jaime Esparza, the same man who prosecuted the first trial. Villegas, who at this time was now declared indigent, requested that his first trial counsel Jaime Olivas be appointed to represent him – to which Olivas agreed – but that motion was denied. Instead, Villegas was represented by John Gates, who was appointed a mere sixty-seven days[2] prior to the start of trial. (WH, Pet. Ex. 1, 32, 71).

76. The State presented an opening statement. During this opening, the State detailed the content of the out-of-court statements of Marcos Gonzalez and Rodney Williams implicating Villegas and remarked that the "evidence will show that in all three statements given by Williams, Gonzalez and the defendant, they admit to being there and they point the finger at the defendant . . . and based on all that evidence, the State of Texas is going to ask you to convict the defendant." (T2, 8/24/95, 145).

77. Gates reserved his opening statement until after the State presented its evidence. (T2, 8/21/95, 141, 145).

78. The State's evidence mirrored what it presented at the first trial.

    a. The surviving victims – Jessie Hernandez and Juan Medina – testified similarly to the first trial, and could not identify their assailants or anyone in the car. (T2, 8/21/95, 172-99; T2, 8/22/95, 206-37).

    b. Responding officers and forensic technicians testified and again none were able to specifically connect Daniel Villegas, Rodney Williams, or Marcos Gonzalez to this crime. (T2, 8/21/95, 147-64; T2, 8/22/95, 237-85, 289-306).

    c. Unlike the first trial, the parties stipulated to the autopsy report, and the medical examiner was not called to testify. The stipulation, however, erroneously stated that Lazo was shot three times, when

[3] Attorney Gates' second affidavit states that he was appointed on June 15, 1995, received the transcripts from the first trial on June 23, 1995, and picked the jury on August 21, 1995. The affidavit goes on to state that he was appointed sixty-six days, and had the transcripts sixty days, before trial commenced. Assuming the dates are correct, however, Gates was actually appointed sixty-seven days, and received the transcripts fifty-nine days, before the beginning of trial.

he was really shot twice. Further, the stipulation failed to include the location of the entrance wounds, both of which were in the front of his body. (T2, 8/23/95, 576-79; WH, Pet. Ex. 32a-30-32).

79. As in the first trial, the State's case hinged on the same four alleged out-of-court statements, all of which were again disavowed at the second trial as they were at the first.

    a. David Rangel testified consistently with what he said at the first trial. Gates did not elicit that Rangel knew that Villegas had read the El Paso Times articles nor did he elicit the specific threats made to Rangel by Detective Marquez. (T2, 8/22/95, 307-46).

    b. Rodney Williams and Marcos Gonzalez also testified consistent with their testimony at the first trial asserting that their signed statements implicating Villegas were not true. The State, however, questioned them about their signed statements in detail. Gates failed to object to the State eliciting testimony regarding the substance of Williams or Gonzalez's signed statements, even though that testimony implicated Villegas as the shooter. (T2, 8/22/95, 347-406; T2, 8/23/95, 408-43).

        i. Gates only briefly cross-examined Williams and Gonzalez. He failed to elicit any testimony regarding most of the detailed threats or promises made to them by their interrogators. Gates also did not elicit testimony to the effect that they did not own a red, maroon, or goldish car. Gates also failed to explore on cross-examination Villegas' alibi, as testified to by Williams and Gonzalez on direct. (T2, 8/22/95, 349-53, 377-79, 381-82; T2, 8/23/95, 423-24, 432-41).

    c. The State again called Detective Marquez, Detective Graves, the juvenile officers involved in the interrogations, and the magistrate judge, who introduced Daniel Villegas' written statement. These officers generally testified consistently with what they said at the first trial. Detective Marquez added that he could get a confession at any point if "he really wanted to." (T2, 8/23/95, 450-510, 515-75; T2, 8/23/95, 504).

i. Gates failed to cross-examine Detectives Marquez or Graves on any of the citizen complaints, internal affairs investigations, claims of perjury, or other false confessions and claims of illegal interrogation tactics alleged against them. Attorney Gates only minimally cross-examined the law enforcement witnesses regarding the demonstrably false details in Villegas' statement.

80. Following the State's case-in-chief, Gates waived the opening statement he had previously reserved for this time. (T2, 8/24/95, 582).

81. Gates called only one witness, Everett Turner, who testified that he was a master sharpshooter, and that he went out to the scene of the Electric Street shooting in an attempt to recreate the shooting as described in Villegas' signed statement. In doing so, Turner failed to hit his target in ten attempts, and Turner believed it would be "virtually impossible" for an individual to intentionally hit his target four out of five times, like that described in Villegas' confession, under those conditions. (T2, 8/24/95, 582-602).

a. Gates failed to present any of the alibi witnesses from the first trial.

b. Gates failed to present any of the witnesses from the first trial that testified to Detectives Marquez and Graves' pattern of improper police behavior, perjury, and illegal interrogation tactics..

c. Gates failed to present any testimony regarding Daniel Villegas' limited intelligence and particular vulnerability to false confession.

d. Gates failed to present the testimony of Paula Masters to demonstrate that a "beer run" did not occur at Diamond Shamrock, contradicting Villegas' signed statement.

82. Gates failed to request a limiting instruction ordering the jury to consider Williams' and Gonzalez's out-of-court statements only for impeachment purposes, not as substantive evidence for the truth of the matter asserted. (T2, 8/22/95, 347-376, 404).

83. Gates' closing argument spanned twenty pages of transcript. During the argument, Attorney Gates specifically suggested that the jury could

consider Gonzalez's and Williams' out-of-court signed statements as substantive evidence. Attorney Gates also spent much of his argument suggesting that Villegas did not intend to kill, but he only committed a reckless act by shooting off the weapon toward the victims. (T2, 8/24/95, 609-629; T2, 8/24/95, 611, 618-19, 625, 628).

84. The State's rebuttal closing argument specifically asked the jury to consider the out-of-court statements of Gonzalez and Williams as substantive evidence, arguments to which Attorney Gates never objected:

And who does [Marcos Gonzalez] finger? The defendant. Who did Rodney Williams finger? The defendant. Now, what consistency. (T2, 8/24/95, 641).

Who does [Rodney] finger? The defendant... This is direct evidence from the boys who were there. (T2, 8/24/95, 642).

[T]his case revolves around three things, doesn't it? Marcos Gonzalez, Rodney Williams and the defendant. ... Why, if they were bragging, why would they be so accurate? Why would they tell us that this happened as they came down Transmountain and they turned on Electric? Why would they tell you that they had seen those people before? That they had fronted them? Unless it was the truth. (T2, 8/24/95, 649).

Guess what? Not only do [Williams, Gonzalez, and Villegas]'s confessions – not only are their statements consistent, not only is their alibi consistent, but I got the three of them together on April 10th, 1993. (T2, 8/24/95, 651).

85. The State's closing argument also specifically pointed to the lack of evidence presented by the defense, evidence that was presented at the first trial:

They got the same alibi. We were babysitting. We were over there up above the apartments babysitting. . . Where is the mother who needed babysitting? (T2, 8/24/95, 637).

Our case was here to be tested and all we got was Everett Turner. (T2, 8/24/95, 643).

There isn't any evidence that he lacks the intelligence to make this confession. None. Absolutely none, so don't go back there and say, well, he's just not smart enough. That's why he took the fall. Think about it. (T2, 8/24/95, 647).

Did you hear any evidence that he wasn't smart enough to make this statement? None. None. No one came in here and told you he was academically slow. No one came in here and told you he was mentally retarded. No one told you his IQ. No one told you that the words in that confession were too big or too large and he couldn't understand them. No one told you that. You can't argue it back there because that's not evidence. You would be guessing. (T2, 8/24/95, 648.)

86. The evidence and argument concluded on August 24, 1995, with a jury finding Villegas guilty of capital murder. Villegas was sentenced to life in prison. (T2, 8/24/95, 653).

D. PROCEDURAL HISTORY

87. On September 8th 1995, Villegas filed notice of appeal.

88. On appeal, Villegas challenged: (1) the procedure for his transfer from juvenile court to the district court and (2) the trial court's denial of his motion to suppress his confession.

89. On July 10th 1997, the Eighth Court of Appeals overruled all of Villegas' appellate issues and affirmed the judgment of the trial court.

90. On appeal, Villegas was represented by attorney Carol Cornwall.

91. Villegas' conviction became final on September 17th 1997, when the Eighth Court of Appeals issued its mandate.

92. Over twelve years after mandate issued, on December 23rd 2009, Villegas filed his application for writ of habeas corpus pursuant to article 11.07 of the Texas Code of Criminal Procedure.

93. Villegas was represented on his writ by attorney Charles L. Roberts.

94. Villegas' writ application alleged a single ground for relief (with multiple sub-grounds) that he received ineffective assistance of counsel in his second trial.

95. On January 25th, 2010, the 41st District Court signed an order designating the issue (ODI) to be resolved as whether applicant was denied effective assistance of counsel in his retrial as alleged in Villegas' writ application at the time the ODI was signed.

96. The 41st District Court's ODI directed attorney John Gates to submit an affidavit to the Court regarding his representation of Villegas.

97. On February 19th 2010, attorney John Gates filed his affidavit.

98. On February 25th 2010, the 41st District Court recused itself from further participation in the writ proceedings due to a conflict of interest.

99. On March 1st 2010, Villegas' writ application was transferred to the 409th District Court by Judge Stephen Ables, presiding judge, Sixth Administrative Judicial Region.

100. The State filed its answer to Villegas' writ application on December 15th 2010.

101. An evidentiary hearing was set for April 25th 2011.

102. On April 20th 2011, five days before the scheduled evidentiary hearing, Villegas filed a new application for writ of habeas corpus asserting two grounds for relief: (1) a claim of ineffective assistance of counsel by his second trial counsel, and (2) a claim of "actual innocence" based on new evidence.

103. The new writ application alleged only that attorney John Gates rendered ineffective assistance due to: (1) failure to investigate and discover that Villegas' confession was illegally obtained, (2) failure to interview and call known defense witnesses, (3) failure to consult with first trial attorney Jaime Olivas, (4) failure to object to inadmissible testimony, (5) failure to request a limiting instruction, (6) failure to request expert witnesses, (7) failure to adequately consult with Villegas, and (8) cumulative error.

104. Villegas' new actual innocence claim alleged that newly discovered evidence showed that: (1) Villegas' confession was coerced, (2) another person "may have been involved," and (3) Villegas' confession contained impossibilities of fact.

105. On April 21st 2011, the State filed its written objection to consideration of Villegas' new writ allegations.

106. The State objected to consideration of Villegas' new writ allegations on the grounds that the State was not accorded its statutory 15-day response time set forth in article 11.07 of the Texas Code of Criminal Procedure.

107. Villegas' "actual innocence" claim was not designated by the 41st District Court as issues involving "controverted, previously unresolved facts that were material to the legality of the applicant's confinement."

108. The State filed its answer to Villegas' new writ application on May 5th 2011.

109. On May 25th 2011, this Court promulgated an Order Designating Issues.

110. This Court found that the issues of fact to be resolved concerned whether: (1) applicant was denied effective assistance of counsel, to wit: by failure to investigate and discover that applicant's confession was illegally obtained, failure to investigate by interviewing witnesses and consulting with first trial defense counsel Jaime Olivas, failure to call known defense witnesses, failure to object to inadmissible testimony, failure to request a limiting instruction, failure to request expert witnesses, failure to consult with applicant, and cumulative error; and (2) applicant is actually innocent based on new evidence, to wit: that applicant was coerced by Detective Marquez into confessing to a double murder he did not commit, recently obtained police reports suggest another individual may have been responsible for the murders, and recently obtained photographs and affidavits demonstrate that the version of applicant's confession contained impossibilities of fact.

111. Evidentiary hearings were held on June 21-24 2011, before being continued until September 6 2011.

112. On September 7 2011, the State again filed written objections to this Court's litigating new and additional grounds for relief not properly pled in Villegas' writ application.

113. Additional evidentiary hearings were conducted on September 6-9 2011, and September 14-15, 2011.

114. The parties were given until October 18 2011, to submit any final affidavits to be considered by the Court, with any counter affidavits to be submitted by October 31 2011.

115. On October 18 2011, Villegas submitted various materials, to include a polygraph results and an affidavit from a juror from Villegas' second trial.

116. On October 18 2011, the State submitted, in their entirety, nine recordings of alleged phone calls made by Villegas while incarcerated in the El Paso County jail.

117. On October 31 2011, the State submitted one additional recording of jail-recorded phone calls by Villegas, an affidavit from inmate Onnie Kirk relating an alleged admission by Villegas that he committed the murders of England and Lazo, and transcripts of portions of the jail-recorded telephone calls.

118. On October 31 2011, the evidentiary portion of the writ hearing closed.

119. On November 10 2011, the State filed its Supplemental Answer to Applicant's Application for Writ of Habeas Corpus.

120. In its supplemental answer, the State reiterated its previous objections to this Court's consideration of any claims not properly pled in Villegas' writ application.

121. Closing arguments were held on November 10 2011, and this Court took the writ under advisement.

E. Findings of Fact Related to the Evidentiary Hearing on Daniel Villegas' Writ of Habeas Corpus.

122. Villegas was represented by Joe Spencer, Joshua Spencer, and Luis Gutierrez at this hearing. The State was represented by Jim Callan, and Doug Fletcher and John Briggs

123. John Gates, who was appointed to represent Villegas sixty-seven days prior to the start of the trial, used the five volumes of transcripts from Villegas' first trial as the primary source of his preparation. He did not receive these transcripts until eight days after being appointed, or fifty-nine days before trial. John Williams, one of the attorneys who prosecuted Villegas at his first trial, testified that he could not have been prepared to prosecute the case in such a short time, and he did not believe any defense counsel could be effective in this case with such a short preparation time. (WH, Pet. Ex. 1 ,32a; WH, 9/6/11, 66-67).

124. Gates requested investigator Sam Streep be appointed a mere six days before trial. Investigator Streep was tasked only with locating witnesses and serving subpoenas; he did not do any factual investigation. Based on conversations Streep had with Gates shortly before the trial, Streep did not believe that Gates understood the facts of the case or that he was adequately prepared for trial. (WH, 9/6/11, 12-14; WH, Pet. Ex. 32a-4).

125. Neither Gates nor any agent or investigator working on behalf of him ever contacted, interviewed, subpoenaed or called to testify any of the following witnesses on behalf of Villegas, all of whom would have cast doubt on the credibility of Detectives Marquez and/or Graves, and would have supported the argument that Villegas' confession was coerced and false:

a. Detective Earl Arbogast, who would have testified that, contrary to Detective Marquez's testimony at both trials and the evidentiary hearing, the police did stop at Northpark Mall prior to taking Villegas to Juvenile Investigative Services. Detective Arbogast would have also testified that Detective Marquez did not have Villegas sign a *Miranda* warning card at home, contrary to the Detective Marquez's testimony. (WH, 6/21/11, 25, 27; WH, 9/8/11, 161-65).

b. Detective Ortega, who did testify for the State at the second trial. Had Gates been prepared, he would have been able to cross-examine Ortega on the discrepancy in his report regarding the time of the *Miranda* waiver, demonstrating that it was signed at 11:15 p.m, while Daniel was already in custody at Juvenile Investigative Services. This conflicted with the testimony of Detective Marquez and demonstrated that Marquez was not credible when he stated that he arrested Villegas shortly after 11:00 p.m., where he allegedly had him sign a warning card at home. (WH, 6/21/11, 159, 196, 206-07; WH, 9/8/11, 161-65).

c. Jesse Hernandez, one of the surviving victims who also testified at trial for the State. Had Attorney Gates prepared or interviewed Hernandez, he would have learned that Detective Marquez used intimidation, threats, and lies when questioning him two days after the murder, accusing Hernandez himself of killing his friend in the manner. (WH, 6/22/11, 54-55).

d. Michael Johnston and his mother Barbara Hoover, who would have testified regarding Detective Marquez's coercive interrogation of Johnston, which actually led to his false confession in this case. (T1, 12/8/94, 312, 317; T1, 12/9/94, 587-89, 596, 598-99; WH, 9/8/11, 41; WH, 9/9/11, 4-7; WH, Pet. Ex. 49).

e. Patricia Cates (formerly Rangel), the mother of David Rangel, who would have testified consistent with her testimony at the first trial. (T1, 12/9/94, 696-97; WH, 6/22/11, 87-88, 93, 99).

f. Detective Arturo Ruiz and Lieutenant Paul Saucedo, both of whom would have testified that contrary to Detective Marquez's testimony, Detective Marquez never asked or ordered either of them to find or listen to a tape containing exculpatory evidence, and thus that they never listened to such a tape. (WH, 6/22/11, 6, 10-11; WH, 9/14/11, 44-45).

g. A police interrogation expert, such as Dr. Richard Leo, who testified at the evidentiary hearing. Such an expert could have educated the jury about the police interrogation process, how the process – especially as alleged in this case – can lead to false

confessions, and how a jury should analyze Villegas' confession to determine its reliability. (WH, 9/9/11, 129-31).

125. Gates, nor any agent or investigator working on behalf of him, ever contacted, interviewed, subpoenaed or called to testify the following witnesses on behalf of Villegas who could have supported the argument that Villegas was particularly vulnerable to police pressure and false confession:

h. Jesus Lechuga, who was the bond officer for Villegas prior to trial and the individual to whom Villegas reported for 12-18 months. Lechuga would have testified that Villegas was a very poor reader with very poor comprehension; indeed, Villegas did not understand that a "home" was the same thing as a "house." (WH, 6/22/11, 167, 169-71).

i. Alberto Renteria, who was a detention officer at the Juvenile Probation Department in 1993 when Villegas was in custody. Renteria would have testified that Villegas was a "very slow thinker" and had a very difficult time understanding Renteria's instructions. (WH, 6/22/11, 122).

126. Gates nor any agent or investigator working on behalf of him ever contacted, interviewed, subpoenaed or called to testify any of the following witnesses on behalf of Villegas, and could have supported the guilt of Rudy Flores and Javier Flores:

j. Terrance Farrar, who would have testified to witnessing a confrontation between Rudy Flores and Armando Lazo two weeks prior to the shooting, during which Flores threatened to kill Lazo. This testimony would have provided a motive for Rudy Flores. Farrar would have further testified to Rudy "stabbing at" Farrar and Javier Flores shooting at him on previous occasions. (WH, 6/23/11, 93-98, 100-01; WH, Pet. Ex. 30).

k. Rocio Gutierrez, who was Armando Lazo's girlfriend prior to his death, who would have testified that Javier Flores and Armando

"had problems" and that both Flores brothers had a reputation for violence. (WH, 6/23/11, 134, 136-37, 141-42).

127. Gates signed an affidavit admitting that he "overlooked" or "did not utilize" substantial amounts of "vital, material, and relevant" evidence. He also admitted that he erred in entering the stipulation to the autopsy report, as it would have been important to highlight that Lazo was not shot in the back, contradicting the suggestion in Villegas' signed statement that he was shot while running away. (WH Pet. Ex. 4, 32a).

128. Gates further admitted that he "missed several key issues" and that Villegas' capital case required "much more preparation" than he did or had time to do. He admitted that had he not made these errors and omissions, "there would have been no plausible reason not to utilize this evidence for Mr. Villegas' second trial." His "trial strategy would have been different and more effective," and he believed "the outcome may have been different." (WH, Pet. Ex. 32a).

129. The evidentiary hearing also produced evidence pointing to the innocence of Daniel Villegas and the guilt of Rudy and Javier Flores through the testimony of the following witnesses:

a. Jamarcqueis Graves was at the Mount Franklin Apartments with several other people shortly after the Electric Street shootings. While there, Graves overheard a conversation between Javier and Rudy Flores with Ben Watson, Phil Tucker, and Johnny Tucker. During this conversation, the Flores brothers referred to "Danny Boy" being "locked up because he went down for something that they had did." Graves also witnessed one of the Flores brothers give Phil a .22-caliber gun and tell him to dispose of it. Graves did not come forward with this information sooner because he was unavailable: he was either incarcerated or living out-of-town in the years between the shootings and the writ hearing. He also generally went on with his life, not knowing that Villegas received a life sentence for the crime. Graves came forward recently, at the urging of his current girlfriend, when he saw the case on the news and billboards around town and told his girlfriend that he knew who

the true killers were. (WH, 9/6/11, 21-22, 26, 40-41, 47-48, 52-53).

b. Connie Martinez Serrano, who knew the Flores family, accompanied a woman named Gloria to the Flores house right after the shooting on Electric Street, as Gloria was intending to pick up a gun. While at the house, Sally Flores, the sister of Rudy and Javier, went to her closet and retrieved a .22-caliber gun, but Gloria would not take the gun after she found out it had been used before. Serrano also revealed that Rudy Flores' best friend, who goes by the nickname Half-Pint, told her that Rudy admitted to shooting the boys on Electric Street. Serrano called Crime Stoppers several times during the investigation to tell them that Rudy Flores was responsible for the crime, but she was rebuffed and told they had the correct killer in custody. (WH, 9/6/11, 89, 91-94, 97; WH, Pet. Ex. 34).

130. The affidavit of Tony Kosturakis, a private investigator retained by Villegas, was also admitted into evidence. This statement confirmed the prior existence of an exculpatory tape. The statement also established that Investigator Kosturakis, at one point, spoke to a witness who confirmed the existence of a hidden .22-caliber gun at the Flores home. (WH, Pet. Ex. 92).

131. Rudy Flores was twice called to testify at the evidentiary hearing, both times invoking his Fifth Amendment right not to incriminate himself. The second time, this Court ordered him to answer the questions, finding that he had waived his privilege by previously signing an affidavit relating to this matter. Flores refused and was found in direct contempt of court. (WH, 9/14/11, 55-57; 9/15/11, 5-8, 12; WH, St. Ex. 6).

132. This Court also finds that the testimony of Detective Marquez at the evidentiary hearing was not credible. This Court reaches this conclusion based on the corroborating evidence presented that supports the claim that Detective Marquez had a pattern and practice of using illegal and coercive interrogation tactics both in this investigation and others. This Court also reaches this conclusion based on other evidence presented in this case, such as:

a. Documents demonstrating that Villegas was likely interrogated long before he was legally allowed to be or when Detective Marquez testified he began questioning him, and

b. Testimony from other law enforcement officers inconsistent with Detective Marquez's testimony

i. Denying that he stopped at Northpark Mall or going to Police Headquarters,

ii. That he ordered other detectives to retrieve what may have been a tape exculpatory to Villegas, and

iii. That he never communicated with Detective Graves while they were in the midst of the interrogations of Villegas and Gonzalez.

c. Testimony from Detective Marquez during the evidentiary hearing that on a previous occasion, he wore a "smock" commonly worn by medical personnel, during the interrogation of a criminal suspect. He further testified that the smock was not used for deception purposes. This Court finds no conceivable way that the wearing of a smock commonly worn by medical personnel, was not intended to deceive this suspect into believing that he was talking to medical personnel and not law enforcement.

In short, this Court gives the testimony of Detective Marquez at the evidentiary hearing little to no weight.

133. This Court finds that the audio tapes submitted by the State of Texas and the Applicant in this case have no relevance to these findings of fact and conclusions of law.

II. CONCLUSIONS OF LAW

A. THE ACTUAL INNOCENCE CLAIM OF DANIEL VILLEGAS

The Court in this case has reviewed the findings of fact and makes the following conclusions of law concerning the Applicant claim of actual innocence. The Court has reviewed the two (2) trial transcripts held in the 41st District Court, the multitude of evidence presented by the Applicant and the State of Texas in the form of documentation, live testimony, as well as submissions to this Court. The basis of this case is pursuant to the Wirt of Habeas Corpus filed by the Applicant on December 23rd, 2009, as well as the Amended Writ filed on April 20th, 2011. This Court has also received the answer(s) and submissions in contest of these writs from the State of Texas that have been duly considered.

This Court is addressing the claim of actual innocence in accordance with the State and Federal law as it exists at the time of the filing of the Writ of Habeas Corpus. Applicant Villegas has asserted that he is entitled to the writ of habeas corpus because he is actually innocent of the crimes for which he was convicted. Such a claim is cognizable in habeas proceedings, including non-capital cases. *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). An applicant may raise a claim of actual innocence under either *Herrera v. Collins*, 506 U.S. 390 (1993), or *Schlup v. Delo*, 513

U.S. 298 (1995). *Ex parte Spencer*, 337 S.W.3d 869, 877 (Tex. Crim. App. 2011). This Court is addressing this claim as a claim of actual innocence under the holding of *Schlup v. Delo*, 513 U.S. 298 (1995). In a *Schlup*-type claim, innocence is tied to a showing of constitutional error at trial: "An applicant must show that the constitutional error probably resulted in the conviction of one who was actually innocent." *Spencer*, 337 S.W.3d at 878.

A *Schlup* claim, in contrast to *Herrera*, accompanies his claim of innocence with an assertion of constitutional error at trial. For that reason, a *Schlup* Applicant's conviction may not be entitled to the same degree of respect as one, such as *Herrera's*, that is the product of an error-free trial. Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim. However, if a petitioner such as in *Schlup* presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error, the petitioner may pass through the gateway and argue the merits of his underlying claims. Consequently, the Applicant's evidence of innocence need carry less of a burden. In *Herrera* (on the assumption that petitioner's claim was, in principle, legally well-founded),

the evidence of innocence would have had to be strong enough to make his execution "constitutionally intolerable" even if his conviction was the product of a fair trial. For *Schlup*, the evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice unless his conviction was the product of a fair trial. See *Ex Parte Elizondo*, 947 S.W.2d 202 (Tex.Crim.App. 1996).

In *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), the petitioner raised a claim of actual innocence in an effort to bring himself within the "narrow class of cases" implicating fundamental miscarriage of justice as an exception to a showing of cause and prejudice for failure to raise the claim in an earlier writ. The Court took pains to distinguish between *Schlup's* claim and the claim presented by the petitioner in *Herrera*. *Schlup's* claim of innocence did not alone provide a basis for relief, but was tied to a showing of constitutional error at trial. *Herrera's* claim of actual innocence had nothing to do with the proceedings leading to his conviction; he simply claimed that execution of an innocent man would violate the Eighth Amendment. The Court expounded upon the differences between the two situations, emphasizing the greater burden that must be borne in order to prevail in a naked claim of actual innocence using clear and convincing evidence.

Clear and convincing evidence is an "intermediate" standard of proof which "falls between the ordinary civil 'preponderance of the evidence' standard and our usual 'beyond a reasonable doubt' standard in criminal cases." *Elizondo*, 947 S.W.2d at 212. It is defined "'as that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.'" *Id.* (quoting *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979).

This Court finds that the Applicant in this case has satisfies the standard for actual innocence under the *Schlup* and *Ex Parte Elizondo* analyses under the law. This Court finds that the underlying verdict from the 41st District Court cannot withstand the legal review afforded by the law, being that this Court believes that a reasonable juror, based on the new evidence presented, would not find the Applicant guilty of the crime of capital murder. Applicant's counsel contacted Benjamin D. Hodge III, the presiding juror from Applicant's second trial to listen to the evidentiary hearing. After attending the hearing and listening to the evidence, Mr. Hodge provided the Applicant with an affidavit on September 20th, 2011 stating he would not have voted to convict again. See *(W.H. Pet. Ex 95.)*

The core of this case revolved around the confessions presented by the State of Texas at trial. Moreover, the focus on the confessions must involve the actions and the methods employed by the El Paso Police Department, particularly Detective Al Marquez.

Through the testimony presented, significant and credible evidence was presented that Detective Marquez, as well as other members of the El Paso Police, used at best "questionable" methods in obtaining the confessions used at trial. The Applicant, Rodney Williams, and Marco Gonzalez were subjected to, by this Court's analysis and observations, illegal and coercive methods that bring doubt and concern to the legality of the admissibility of the confessions. Although the State of Texas asserts that these confessions have been litigated and subjected to several legal reviews by the Trial and Appellate Courts, this Court must still question the confessions based upon the testimony of Detective Marquez himself at the evidentiary hearing. Based on the evidentiary hearing testimony, the inconsistencies in the statements, as well as voluntariness of the statements, this Court has no other alternative than find that the confessions in this case to be completely unreliable and require this Court to recommend a new trial.

This Court finds that the testimony of Detective Marquez at the evidentiary hearing was not credible. This Court reaches this conclusion

based on the corroborating evidence presented that supports the claim that Detective Marquez had a pattern and practice of using illegal and coercive interrogation tactics both in this investigation and others. This Court also reaches this conclusion based on other evidence presented in this case. Documents demonstrating that Villegas was likely interrogated long before he was legally allowed to be or when Detective Marquez testified he began questioning him. Additionally, testimony from other law enforcement officers inconsistent with Detective Marquez's testimony such as denying that he stopped at Northpark Mall or going to Police Headquarters. Testimony that Detective Marquez ordered other detectives to retrieve what may have been a tape exculpatory to Villegas calls his credibility into question. Also, Detective Marquez's testimony that he never communicated with Detective Graves while they were in the midst of the interrogations of Villegas and Gonzalez contradicted the testimony of the other officers involved. However, the most disturbing testimony received by the Court was concerning another case where Detective Marquez donned a "smock" while questioning a defendant, with an admission by Detective Marquez, that "the tactic was not done with the intent to deceive." This Court cannot help but come to the conclusion, especially considering the age of the Defendant and other accused juveniles in this case, that these statements

were both factually incorrect as well as illegally obtained by Detective Marquez. This coincides with the testimony that Daniel Villegas immediately recanted his confession to Monica Sotelo, a juvenile probation officer, as soon as he was away from Detective Marquez. Villegas told Probation Officer Sotelo that "he didn't do it," and that he only confessed because "the cops were harassing him." "Tired and want[ing] to go back to sleep, [he] told them what they wanted to hear."

Detective Scott Graves interrogation of both Rodney Williams and Marco Gonzalez also reveal the same inconsistent information as the Applicant's statement. Gonzalez in fact made two (2) statements which were testified to in the writ hearing. The first statement containing inconsistencies was then amended by a second statement which coincided with the Applicant's statement. Combined with the inconsistent testimony that the officers did not speak to each other, is of importance to this Court.

This Court further finds that the same statements used by the State in obtaining the convictions contain factual impossibilities which calls the conviction into doubt. The Court heard evidence that the Applicant's signed confession contained details that are demonstrably false and factually impossible in several ways. The person identified as "Popeye" was incarcerated at the time of the offense. As such, he was not driving the car

involved in the shooting. The person identified as "Droopy" was under house arrest at the time of the shooting and was under electronic surveillance via an ankle bracelet. He was therefore not in the passenger seat at the time of the murder, nor did he yell "Que Barrio" at the victims. No beer was stolen at Diamond Shamrock on the evening of the shooting; therefore, there was no "beer run" committed by the group of boys, which was contained in Applicant's statement.

The physical evidence in this case, especially at the scene of the shooting on Electric Street, presented a critical problem for the State of Texas. The problem exists where the State's contention at trial was that Applicant's confession described the manner and positions of the shooters on Electric Street. Specifically, the statement describes that the suspects shot at Armando Lazo by chasing him to a door directly behind them where Lazo began ringing a doorbell for assistance. However, the physical evidence at the scene, both in the trial transcripts as well as the evidentiary hearing, reveal no shots to Lazo's back. In addition, there was no evidence presented that any bullet casings where Lazo allegedly was shot were discovered. This is of great importance to this case as physical evidence is usually the cornerstone of the State's prosecution. In this case, however, the defense not only overlooked this evidence which this Court views as critical, it

disregarded the strongest area of physical evidence to the Applicant's innocence.

The testimony and circumstances of the night of the shooting also causes concern for the Court in viewing the underlying conviction. Two weeks before the shooting, fifteen-year-old Rudy Flores, an LML gang member who was known as "Dust," had a confrontation with Robert England and Armando Lazo at a party, during which time he threatened to kill Lazo and waited outside to fight him. Rudy's older brother, twenty-year-old Javier Flores, who was known as "Dirt," also had confrontations with Armando Lazo and fought him at school. Rudy Flores had a car that was similar to the one described by the surviving victims. Later on in the evening, gunshots were reported on Shenandoah Street in close proximity to the scene of the Electric Street shooting. Officer Bellows was the first responding officer to both of the shootings. Rudy Flores was present during the Shenandoah Street shooting. In addition, a .22-caliber weapon was recovered by police in connection with the Shenandoah Street shooting. These shootings took place within ¼ mile of each other and the testimony revealed that no investigation by the El Paso Police Department to see if these matters were possibly connected.

Other information not utilized would have further pointed to the Flores brothers as viable third-party suspects. Rudy Flores was admittedly present at a shooting involving a .22-caliber weapon later that same day, just blocks away on Shenandoah Street. At the same time, Rudy Flores admitted to the police that he was at the intersection of Transmountain Road and Electric Street, at the exact time the Electric Street shooting occurred. He also attempted to give himself an alibi by saying that he was at home at 12:30 a.m., just minutes after the shooting, but his brother Javier indicated to the police that Rudy was not home at that time. Had this information about the Flores' brothers' opportunity and ability, in addition to their motive, to carry out this crime been investigated by Gates and been presented to the jury, it would have cast further suspicion over them as viable alternative suspects. Rudy Flores' recent invocation of his Fifth Amendment privilege at the writ hearing even after this Court ruled that he had waived that right and held him in contempt, only reinforces this position.

The new evidence provided by Villegas consists primarily of the testimony of Jamarcqueis Graves and Connie Martinez Serrano. The evidence presented by Graves meets the requirement that evidence supporting an innocence claim must be "newly discovered." Graves was entirely unknown to Villegas and his attorney at the time of trial. This lack

of knowledge was not due to lack of diligence; in fact, Graves was only discovered after he voluntarily came forward at the urging of his girlfriend after seeing news reports and billboards covering Villegas' pending writ hearing. He did not come forward earlier because he had been incarcerated and later moved out-of-state for a time.

Ms. Serrano was similarly unavailable. Although she did contact the police shortly after the Electric Street shootings, she was unmentioned in any police reports as having information related to the Flores family, and therefore Villegas could not be expected to discover this evidence. This evidence is material such that it would probably bring about a different result at another trial and, moreover, it constitutes affirmative proof of Villegas' innocence. According to Graves, the Flores brothers did not merely take responsibility for the shootings; rather, they specifically articulated that Villegas was innocent and "locked up because he went down for something that they had did." The importance of Graves' testimony could not be clearer. The Flores brothers could have been responsible for the shooting.

Graves' testimony also states that he witnessed one of the Flores brothers give someone a .22-caliber gun to dispose. This testimony is corroborated by that of Connie Martinez Serrano, who states that she was

with a woman named Gloria at the Flores house very shortly after the Electric Street shooting. During this visit, Sally Flores, the sister of Javier and Rudy, tried to give Gloria a .22-caliber gun, but Gloria refused when she learned it had been used. This testimony demonstrates that the Flores family was attempting to dispose of a .22-caliber gun, lending credibility to Graves' testimony that the Flores brothers later ordered their friend Phil to dispose of the gun. This testimony is further corroborated by Tony Kosturakis, a private investigator retained by Villegas, who said that he spoke to a witness who gave similar information about a hidden .22-caliber gun at the Flores home.

Finally, Javier Flores' own statement to police during the investigation contradicts his brother Rudy's statement claiming that he was home on April 10, 1993 at 12:30 a.m., near the time of the shooting. Javier maintains that he arrived home at 12:30 a.m., and Rudy was not there. (WH, Pet. Ex. 34, Pet. Ex. 35.) This contradiction suggests that Rudy may have been attempting to create a false alibi for himself.

At Villegas' second trial, no evidence was presented that Rudy Flores could have committed the crime for which the Applicant was convicted. Therefore, Jamarcquies Graves' testimony is independently competent and is not cumulative, corroborative, collateral, or impeaching. *Van Byrd v. State*, 605 S.W.2d 265, 267 (Tex. Crim. App. 1980).

In *Schlup*, "the petitioner raised a claim of actual innocence in an effort to bring himself within 'the narrow class of cases' implicating a fundamental miscarriage of justice as an exception to a showing of cause and prejudice for failure to raise the claim in an earlier writ." *Elizondo*, 947 S.W.2d at 208 (citing *Schlup*, 513 U.S. at 298). Successful *Schlup* claimants are the "extraordinary" cases. *Brooks*, 219 S.W.3d at 400. The Court of Criminal Appeals recognizes that Texas law "allows review of the merits in the exceptional circumstances of a constitutional violation resulting in the conviction of one who is actually innocent of the offense." *Id.* at 401. To grant *Schlup* relief, an applicant must meet the threshold requirement of showing that a constitutional violation led to a miscarriage of justice due to the incarceration of someone who is actually innocent. *Id.*; *see also Ex parte Thompson*, 179 S.W.3d 549, 557 n.19 (Tex. Crim. App. 2005).

As opposed to *Herrera*, a *Schlup* claimant, on the other hand, need only show that he is "probably" actually innocent, meaning "more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Elizondo,* 947 S.W.2d at 209; *see also Schlup*, 513 U.S. at 326–27. The lower standard is justified because the conviction "may not be entitled to the same degree of respect of one, such as *Herrera's,* that is the product of an error-free trial." *Schlup*, 513 U.S. at 316. To obtain relief on a

Schlup claim, the claimant must therefore show that the constitutional error at trial probably resulted in the conviction of one who was actually innocent. *Spencer*, 337 S.W.3d at 878.

In this case, this Court finds that the evidence that has been presented by the Applicant, in a cumulative manner, meets the clear and convincing evidentiary standard to determine that the jury in this case could have reasonably found the Applicant innocent in this case. The Court is of the opinion that the new evidence standard has been met under *Schlup*, and now proceeds to examine if constitutional error, if any, can be demonstrated to meet the *Schlup* standard set forth, *infra*.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

This Court has examined the claim of ineffective assistance of counsel in this matter with great attention and detail. This Court has reviewed the law applicable in this case with the evidence and submissions in this case. With the above in mind, it is with clear and convincing evidence that this Court finds that Applicant did not receive effective assistance from John Gates in his trial in the 41st District Court. This Court finds the performance by counsel in this case to fall to such a level that, in and of itself, counsel's performance was deficient to such a level that a fair trial was denied to the Applicant in multiple areas. As such, the performance of

counsel in this case arises to the level of constitutional violation which satisfies the analysis and legal standard not only in the *Schulp* holding, but to the holding in *Strickland v. Washington* as well.

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. U.S. Const. amend. VI; Tex. Const. Art. I, § 10. The right to counsel necessarily includes the right to reasonably effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The United States Supreme Court has established a two-prong test to determine whether counsel is ineffective. *Id.* First, appellant must demonstrate counsel's performance was deficient and not reasonably effective. *Id.* at 688–92. Second, appellant must demonstrate the deficient performance prejudiced the defense. *Id.* at 693. Essentially, appellant must show his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*; Valencia v. State, 946 S.W.2d 81, 83 (Tex. Crim. App. 1997).

Judicial scrutiny of counsel's performance must be highly deferential and the Court must indulge the strong presumption counsel was effective. Jackson v. State, 877 S.W.2d 768, *771 (Tex. Crim. App. 1994). The Court*

must presume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. Id. Moreover, it is appellant's burden to rebut this presumption by a preponderance of the evidence, via evidence illustrating why trial counsel did what he did. *Id.* Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 119 (1997). A breakdown in the adversarial process implicating the Sixth Amendment is not limited to counsel's performance as a whole; specific errors and omissions may be the focus of a claim of ineffective assistance as well. *United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984). The failure to object to evidence has been held to be ineffective assistance of counsel. See *Ramirez v. State*, 65 S.W.3d 156 (Tex. App. — Amarillo 2001, pet. ref'd), *Prudhomme v. State*, 28 S.W.3d 114 (Tex. App. — Texarkana 2000), and *Matter of K.J.O.*, 27 S.W.3d 340 (Tex. App. — Dallas 2000, pet. ref'd).

In *Ex parte Lane*, 303 S.W.3d 702 (Tex. Crim. App. 2009), the defendant was denied effective assistance of counsel when trial counsel failed to request pretrial notice of the State's experts and to object to the

"expert" testimony of a DEA agent at the penalty phase about the dangers and societal costs of methamphetamine use. The officer was not qualified to express the opinions contained in his testimony. Harm was shown where the prosecutor used the testimony to argue for a life sentence, and the jury imposed one. Remanded for new punishment hearing.

In Ex parte Drinkert, 821 S.W.2d 953 (Tex. Crim. App. 1991) the defendant was entitled to a new trial where he received ineffective assistance of counsel. Trial counsel failed to object to the indictment, which alleged in one of its counts that aggravated assault was a predicate offense of felony murder, and also failed to object to the charge, which authorized a conviction on this theory. Because the jury returned a general verdict, it was impossible to tell if it relied on this theory to convict and therefore harm was shown. Trial counsel also failed to object when the prosecutor asked the jury to consider the victim's state of mind, rather than the defendant's, when evaluating self-defense. This misstatement of the law was contrary to the jury charge. Absent these errors, there is a reasonable probability that the jury would not have convicted the defendant.

In Ex parte Zepeda, 819 S.W.2d 874 (Tex. Crim. App. 1991) the defendant received ineffective assistance of counsel where trial counsel failed to object to the omission of an accomplice instruction from the jury

charge. Two prosecution witnesses who were charged with involuntary manslaughter in the same incident as the subject of the trial were accomplice witnesses as a matter of law. They gave the only direct evidence that the defendant committed the murder. Therefore, there was a reasonable probability of acquittal if the instruction had been given.

In Ex parte Felton, 815 S.W.2d 733 (Tex. Crim. App. 1991) the defendant received ineffective assistance of counsel when his lawyer failed to object to the use of a 1961 capital murder conviction to enhance punishment. The conviction was void because a jury trial was waived, but the lawyer was unaware of this. Under the "reasonably effective assistance" standard applicable to punishment hearings, this was ineffective assistance. Harm was shown because this was the defendant's only prior conviction, use of the evidence kept the defendant from testifying at trial, and the enhancement count raised the minimum from five to fifteen years, which may have influenced the defendant's seventy-five year sentence.

In *Callaway v. State,* 594 S.W.2d 440 (Tex. Crim. App. 1980) almost total failure to object to highly prejudicial argument and testimony at competency hearing and failure to timely subpoena psychiatric witness denied effective assistance. *See also Cude v. State*, 588 S.W.2d 895 (Tex. Crim. App. 1979) (Denied effective assistance).

In Johnson v. State, 172 S.W.3d 6 (Tex. App.-Austin 2005, the defendant was denied effective assistance of counsel, and a new trial was required, where counsel failed to object to the state's failure to disclose audiotaped statements made by the defendant at the time of the arrest, and, when a portion of the tape was played at trial, failed to offer the exculpatory final portion of the tape. Because the tape was critical to the case, harm was shown and reversal is required.

Under the *Strickland* standard, trial counsel is deficient if his or her conduct is objectively "unreasonable under prevailing professional norms." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (citing *Strickland*, 466 U.S. at 688-89). The adequacy of an attorney's services is to be judged by examining the "totality of the representation." *Mercado v. State*, 615 S.W.2d 225, 228 (Tex. Crim. App. 1981). To establish deficient performance, an applicant must overcome the "presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992) (citing *Strickland*, 466 U.S. at 689). This Court must "keep in mind that it must be highly deferential to trial counsel and avoid the deleterious effects of hindsight." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984)). Despite this presumption,

however, such deference is appropriate only when an attorney has demonstrated reasoned, strategic decision-making. *See, e.g., Williams v. Washington*, 59 F.3d 673, 679 (7th Cir. 1995) ("Review of the first prong contemplates deference to *strategic* decision making") (emphasis added); *see also Wiggins v. Smith*, 539 U.S. 510, 526 (2003) (finding ineffective assistance where counsel's errors were the result of "inattention, not reasoned strategic judgment").

In the case before the Court, multiple and significant errors exist in the trial are of such a deficiency that the Court cannot view the actions of counsel as any form of strategy that any competent lawyer would pursue in a capital murder case. In addition, even with the Court viewing Mr. Gates actions as deferential towards competency, the deficiency of the actions taken in Applicant's trial overcome the standards set in *Strickland* to a level that meets the requirements of the *Schlup* Court and mandate this Court to recommend a new trial. The Court finds that Counsel failed to object to the introduction of the confessions which resulted in ineffective assistance of counsel. Given that Marcos Gonzalez and Rodney Williams denounced their out-of-court handwritten statements and provided exculpatory testimony for Daniel Villegas at his first trial, both the State and Gates were on notice that their in-court testimony would be favorable to Villegas at the second trial.

With this backdrop, this Court must first evaluate whether Gates had a proper legal basis for objecting to the State's introduction of Gonzalez and Williams' hearsay statements under the law at the time of trial in August 1995. *Ex parte Welch*, 981 S.W.2d 183, 184 (Tex. Crim. App. 1998) (citing *Vaughn v. State*, 931 S.W.2d 564, 567 (Tex. Crim. App. 1996) ("counsel's performance will be measured against the state of the law in effect during the time of trial").

Nothing in the record indicates that Attorney Gates had legitimate strategic reasons for failing to object to the State's calling of Gonzalez and Williams, or, at the minimum, request a limiting instruction and object to the State's substantive use of their testimony during closing. In his initial affidavit, Gates merely states that "I only recall making a tactical decision not to attempt to exclude the testimony, but the specific reasoning and mental impressions I cannot remember." (Gates First Aff. at 2). This unsupported assertion is not dispositive. *See Brown*, 304 F.3d at 688 (warning against the acceptance of "post hoc, self-serving" claims from attorneys who make "blanket and general statements" in the context of ineffectiveness proceedings).

This Court further finds that Counsel was ineffective in failing to suppress or challenge the State of Texas in suppressing Applicant's

confession. To obtain relief on the grounds of ineffective assistance of counsel for failing to make a motion to suppress evidence, the defendant "is required to prove that the motion would have been granted." *LaFleur v. State*, 79 S.W.3d 129, 137 (Tex. App. 2002) (citing *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998)). At the time of sixteen-year-old Daniel Villegas' arrest and subsequent confession in this matter, Tex. Fam. Code §52.02(a) provided:

> (a) A person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under 52.025 of this code, shall do one of the following:
>
> (1) release the child to a parent, guardian, custodian of the child, or other responsible adult upon that person's promise to bring the child before the juvenile court as requested by the court;
>
> (2) bring the child before the office or official designated by the juvenile court if there is probable cause to believe that the child engaged in delinquent conduct or conduct indicating a need for supervision;
>
> (3) bring the child to a detention facility designated by the juvenile court;
>
> (4) bring the child to a medical facility if the child is believed to suffer from a serious physical condition or illness that requires prompt treatment; or
>
> (5) dispose of the case under Section 52.03 of this code.

Act of May 26, 1991, 72d Leg., R.S., ch. 495, § 1, Tex. Gen. Laws 1738. *See also Le v. State*, 993 S.W.2d 650, 655 (Tex. Crim. App. 1999) (explaining the 1991 amendment was in effect at the time of this case).

The purpose of section 52.02(a) is to reduce an officer's impact on a child in custody. *Le*, 993 S.W.2d at 655. Texas reviewing courts have consistently held that any statement from a minor obtained in violation of these provisions of the Family Code will result in the suppression of the statement. For example, in *Le*, the law enforcement officer first took the minor murder-suspect to a juvenile processing center in compliance with section 52.025, but then took him to an unauthorized police station to obtain a statement prior to taking one of the five actions contemplated by section 52.02(a). *Id.* The officer's error therein was not obtaining a statement at an unauthorized locale, but rather doing so prior to first complying with 52.02(a) "without unnecessary delay." *Id.* The error resulted in an illegally obtained confession that should not have been admitted against the minor. *Id.* at 654-56. *See also Comer v. State*, 776 S.W.2d 191, 196 (Tex. Crim. App. 1989) (detaining the minor suspect for the three hours it took to obtain his confession violated 52.02(a). To compound matters further, the conduct of the El Paso Police Department, particularly Detective Al Marquez, who conducted themselves in a manner where even a questionably competent

attorney would challenge their action both before the trial court as well as the jury results in ineffective assistance. The failure of counsel to question any of the witnesses in a suppression, or in trial, allows the inconsistencies of the statements, mentioned *infra*, to stay buried and caused a result that a reasonable juror, now knowing these facts, would change their verdict in the Court's opinion.

Daniel Villegas was arrested at his home at approximately 10:00 p.m. on April 21, 1993. Detective Marquez testified at the first trial that he had his juvenile *Miranda* warnings with him at the time of arrest, read them to Villegas at his home, and knew of his obligation to take Villegas directly to Juvenile Investigative Services, an accepted "juvenile processing office" pursuant to section 52.02(a). Based on the testimony of Detective Arbogast and others at the writ hearing, however, it is now clear Detective Marquez did not take Villegas immediately to Juvenile Investigative Services. Rather, law enforcement officers drove Villegas past the home of Fernando Lujan ("Droopy"), and questioned him as to whether he knew someone named "Snoopy." They then drove to Northpark Mall, where the officers convened for some time. Following that meeting, the officers took Villegas to police headquarters, which was also not a "juvenile processing office," an office designated by the juvenile court, or a juvenile detention facility. *See* Tex.

Fam. Code § 52.02(a)(2), (3); §52.025. Only after Villegas was at Police Headquarters did law enforcement finally take him to Juvenile Investigative Services, or a proper "juvenile processing office." To this end, law enforcement violated Daniel Villegas' rights under the Family Code by failing to comply with section 52.05 "without unncecessary delay." *See Le*, 993 S.W.2d at 655. In short, Detective Marquez should have taken Villegas to Juvenile Investigative Services as he originally testified at the first trial he did, testimony that new evidence demonstrates conclusively is false.

Attorney Gates' first affidavit proposes no strategic reason for failing to seek the suppression of Villegas' confession; given that Villegas's confession was the lynchpin of the State's case, there could be no such sound strategy for failing to do so. *See Mitchell*, 762 S.W.2d at 920. *See also* E. Cleary, McCormick on Evidence 316 (2d ed. 1972) (explaining that "the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained"). And, indeed, Gates' second affidavit makes clear that his decision was not strategic but rather was based on information that "eluded" him. Attorney Gates admitted that he would have "heavily litigated" the issue of the violation of the Family Code had he (1) interviewed Detective Abrogast and discovered that the officers did not

immediately go to Juvenile Investigative Services, (2) discovered that Villegas' *Miranda* warning card was not signed until 11:15 p.m., (3) utilized the Juvenile Probation Department time logs showing that Villegas did not arrive until 12:26 a.m., or (4) "pick up on the fact" that Detective Ortega's police report states that Villegas had already given a verbal statement prior to meeting with the magistrate or that officers had already requested permission by 12:26 p.m. to take Villegas to Popeye and Droopy's homes. (WH Pet. Ex. 32a). It is clear to this Court that Gates did not make a strategic decision; his conduct, rather, is best explained by the fact that he lacked a firm grasp of the facts of the case.

Despite available evidence from the first trial demonstrating that Detective Marquez had a pattern and practice of using illegal and coercive interrogation tactics to obtain other false confessions during this investigation and others, Gates almost entirely failed to introduce this evidence to the jury. Gates failed to (1) call Michael Johnston or his mother to testify that Johnston falsely confessed to the Electric Street murders during a coercive interrogation by Detective Marquez, (2) interview Jesse Hernandez to learn that Detective Marquez employed coercive tactics against him, (3) call attorneys Michael Gibson or Bruce Weathers to testify concerning their familiarity with Detective Marquez, his prior acts of

dishonesty, and his prior use of illegal interrogation tactics, and (4) cross-examine or introduce evidence of the many citizen complaints and internal affair investigations related to Detective Marquez. Once again, given the short time between the first and second trials, the evidence and witnesses supporting Detective Marquez's prior conduct were available at the second trial.

Gates, moreover, failed to elicit any significant details from David Rangel, Marcos Gonzalez, or Rodney Williams regarding the coercive circumstances of their interrogations. This failure is particularly noteworthy given that the State has taken the position that Gates strategically chose not to seek to exclude the testimony of Gonzalez and Williams. Gates' failure to highlight the coercive atmosphere under which Gonzalez and Williams' statements were taken undermines the State's argument because this powerful evidence is the most compelling reason for allowing them to testify about their out-of-court statements without objection.

Gates also failed to introduce testimony and arguments through Detective Arbogast and Officer Aguilera demonstrating that Marquez's testimony about immediately taking Villegas to Juvenile Investigative Services, never stopping at Northpark Mall, and reading Villegas his *Miranda* rights at his home at 11:15 p.m. was inconsistent with these

officers' testimony. He further failed to present readily available evidence and argument of Villegas' particular vulnerability to interrogation pressure, including his limited intellectual capacity, his youth, and his tendency to tell people what they want to hear. Compounding these errors was his failure to present evidence of Villegas' immediate recantation to Monica Sotelo and the explanation for his false confession.

As mentioned in the Courts analysis of actual innocence, there were no shortage of highly probative impossibilities in Villegas' confession. Most notably, Villegas (1) named a co-conspirator ("Popeye," the driver of the car) who was incarcerated at the time of the offense; (2) named another co-conspirator ("Droopy") who was confirmed by his probation officer and his monitoring device to be in his home on house arrest at the time; (3) described a "beer run" that never happened; (4) appeared to describe a car and an initial interaction unlike that seen or described by the surviving eyewitnesses; and (5) suggested that there were two series of gunfire, in contrast with the autopsy report, the Gorhams' recollection, and the testimony of Hernandez and Medina.

Where Villegas' first trial counsel carefully presented evidence, argument, and cross-examination pointing out these inconsistencies, Attorney Gates remained mostly silent on these matters. Gates himself now

acknowledges that he "overlooked" or "did not utilize" a substantial amount of "vital, material, and relevant" evidence. He did not call Paula Masters to refute that a "beer run" occurred, and only briefly mentioned during closing that the driver ("Popeye") and passenger ("Droopy") could not have been involved in the crime. Instead, Gates' closing spent more time acknowledging the likely *guilt* of his client by arguing that his gunshots were merely reckless acts, not intentional. Gates also now admits he erroneously stipulated to the autopsy report that overstated the number of bullet wounds and failed to mention that Armando Lazo was not shot in the back, contradicting the suggestion in Villegas' statement that Lazo was shot as he was running away.

Furthermore, all of the correct details that Villegas actually got right in his signed statement were widely publicized in the local media. Unlike Villegas' first trial counsel, however, Gates never elicited from David Rangel or anyone else that Villegas had read the El Paso Times articles and was familiar with the reported details of the shooting. In short, it appears that Villegas was unable to accurately describe anything about the shootings that had not been reported and read by him in the newspaper – but Gates never made this point. In a case where so many of these arguments to challenge the

confession were readily available, defense counsel's failure to pursue them was constitutionally deficient.

The Court further recognizes one area of failure where Gates was particulary deficient. In the trial before the 41st District Court, Gates did bring a Motion for Continuance after less than 59 days of preparation for trial. On trial day, Counsel moved for continuance based on his Motion to Transfer Venue, filed that same day before the Court. The Court immediately overruled Counsel's Motion To Transfer Venue and Counsel withdrew his Motion for Continuance. This Court fails to see any conceivable strategy or plan which would possibly justify Counsel's action to base his Continuance on a summary Motion that was denied by the Court.

One of the most glaring issues this Court has viewed in the case at bar is the amount of time that counsel had between the time of appointment to trial. In the Court's calculation, the amount in time in question was fifty nine (59) days. Even if this Court assumed, *arguendo*, that Counsel had voluminous and specialized experience in the area of capital murder, it is beyond any logic or strategy that a competent attorney could fathom being ready for trial in this amount of time. With capital murder being one of the highest crimes the Texas Penal Code can charge a citizen with, the logistics of investigation, reviewing trial transcripts, interviewing witnesses, securing

experts, as well as trial preparation cannot be accomplished, in this Court's humble opinion, in 59 days. In fact, Gates affidavit specifically stated that his entire preparation for this capital murder trial consisted on reading the trial transcript, Further, Gates also stated that he received these transcripts until a week after his appointment and the transcripts he received were incomplete.

In addition, Gates requested investigator Sam Streep be appointed a mere six days before trial. Investigator Streep was tasked only with locating witnesses and serving subpoenas; he did not do any factual investigation. Based on conversations Streep had with Gates shortly before the trial, Streep did not believe that Gates understood the facts of the case or that he was adequately prepared for trial. This was Streep's testimony in the evidentiary writ hearing. Notably, Gates himself now admits he made significant mistakes in Villegas' trial, an opinion shared by Investigator Streep, whom Gates requested a mere six days before the start of trial. In his most recent affidavit, Gates acknowledges that "he missed several key issues" and that the case required "much more preparation" than he gave it. He acknowledged that he had "no plausible reason" for not utilizing exculpating evidence at the second trial and believes that his "trial strategy would have

been different," "more effective," and might have resulted in a "different" outcome for Villegas had he not overlooked this evidence.

This Court also heard testimony from John Williams, who was one of the attorneys for the State of Texas in Applicant's first trial. Mr. Williams, who himself is now an attorney in private practice, testified at the writ hearing that there was no conceivable way that a State's prosecutor could have been ready to prosecute this case in 59 days. This is especially important to this Court as the State of Texas, with its considerable resources and manpower, could not accomplish what the State of Texas claims Mr. Gates could do in the same amount of time. Mr. Williams also testified that he could not have been prepared, if he had been the prosecutor in the second case, in 59 days even though he had intimate knowledge from having prosecuted the first trial. He also testified that even now, as a defense attorney, it is impossible to imagine being adequately prepared for a capital murder trial under any circumstances in 59 days.

Defense counsel has a duty to investigate and explore all avenues of defense. *Wiggins*, 539 U.S. at 521; *Kimmelman*, 477 U.S. at 384; *Ex Parte Wellborn*, 785 S.W.2d at 393; *Freeman v. State*, 167 S.W.3d 114, 119 (Tex. App. 2005); *Briggs*, 187 S.W.3d at 467. The failure to use available impeachment of a key government witness may constitute deficient

performance. *Fahimi-Monzari v. State*, 2010 Tex. App. LEXIS 3902, at *23 (Tex. App – Dallas 5th Dist.); *Beltran v. Cockrell*, 294 F.3d 730, 734 (5th Cir. 2002). Other information Attorney Gates had available but did not utilize would have further pointed to the Flores brothers as viable third-party suspects. Rudy Flores was admittedly present at a shooting involving a .22-caliber weapon later that same day, just blocks away on Shenandoah Street. At the same time, Rudy Flores admitted to the police that he was at the intersection of Transmountain Road and Electric Street (the scene of the Electric Street shooting) at the exact time the Electric Street shooting occurred. He also attempted to give himself an alibi by saying that he was at home at 12:30 a.m. (just minutes after the shooting), but his brother Javier indicated to the police that Rudy was not home at that time.

Had this information about the Flores' brothers' opportunity and ability, in addition to their motive, to carry out this crime been investigated by Gates and been presented to the jury, it would have cast a further cloud over them as viable alternative suspects. Rudy Flores' recent invocation of his Fifth Amendment privilege even after this Court ruled that he had waived that right and held him in contempt, only reinforces this position. *See generally Coffey v. State*, 744 S.W.2d 235 (Tex. App. – Houston [1st] 1987), aff'd, 796 S.W.2d 175 (Tex. Crim. App. 1990) (explaining that there is no

error in calling to the stand a witness who invokes an *invalid* Fifth Amendment privilege).

Gates excuses his decision not to investigate or call these witnesses because after speaking with jurors in *other* cases, he had developed a belief that "alibi witnesses were generally ill-considered by juries, their testimony viewed skeptically and, in may [sic] instances, served only to anger them." (Gates First Aff. at 2-3.) Whatever post-trial investigation he may have done in other unrelated cases, however, cannot excuse his pre-trial failure to investigate in this case. The law is clear that an attorney's decisions must be based on "an independent investigation of the *facts and circumstances in the case*" – in other words, he must make a case-specific determination regarding whether a particular client should forgo or pursue testimony from a particular alibi witness based on the particular facts and context of that particular case. *See Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) (emphasis added); *see also Butler v. State*, 716 S.W.2d 48, 55 (Tex. Crim. App. 1986) ("It is fundamental that an attorney must acquaint himself not only with the law but also the facts of a case before he can render reasonably effective assistance of counsel") (internal citations omitted).

This obligation to make case-specific judgments cannot be satisfied when an attorney simply assumes that certain types of testimony – including

potentially significant alibi testimony – could never be valuable. In a *Schlup*-type claim, innocence is tied to a showing of constitutional error at trial: "An applicant must show that the constitutional error probably resulted in the conviction of one who was actually innocent." *Spencer*, 337 S.W.3d at 878. Accordingly, the *Schlup*-type claim here depends on the validity of Villegas' constitutional claim of ineffective assistance of counsel. For the reasons stated herein, this Court finds that the substantive ineffective assistance of counsel claim raised by Applicant Villegas is valid and would therefore also recommend relief under *Schlup*.

Finally, other evidence "newly available" to Villegas – that was unavailable, in part, because of the ineffective assistance of his second trial counsel – further demonstrates that a rational trier of fact would acquit Villegas. *See Spencer,* 337 S.W.3d at 878 (considering evidence that is both "newly discovered" and "newly available"). This evidence includes the uncalled alibi witnesses, evidence challenging the voluntariness and reliability of Villegas' confession, and all of the other evidence of Flores' possible guilt outlined above. When considering this evidence with the other newly discovered evidence described, this Court is convinced that justice requires that Villegas' writ be granted.

However, the one of the most disturbing factors in trial counsel's performance was where, in closing argument, Gates argued the Applicant's actions were based on recklessness and not intentional. In this Court's opinion, by this very argument, the proverbial nail was hammered into the Applicant's case to ensure that a conviction was inevitable. This statement in closing argument, by defense counsel and not the State of Texas, along with the controverted and unreliable evidence, all but guaranteed a conviction in this case.

Strickland's prejudice analysis requires this Court to weigh the cumulative impact of all defense counsel's deficiencies. *See Strickland*, 466 U.S. at 695. In this case, Attorney Gates' multiple failures were all mutually reinforcing. His failure to challenge the circumstances of Villegas' questioning and the reliability of the confession left the jury with the impression that the signed statement was credible on its face; his failure to prevent the State from calling Gonzalez or Williams – or from subsequently using their testimony substantively – left the jury with the impression that Villegas' confession was corroborated, especially where he inadequately elicited the circumstances of their statements; and his failure to call alibi witnesses left the jury with the impression that Villegas had no extrinsic evidence with which he could prove his confession false. Taken together,

this perfect storm of errors created prejudice against Villegas and altered the outcome of the trial.

Ramirez v. State 873 S.W.2d 757, 762-63 (Tex. App. 1994), exemplifies the value of examining the counsel's performance in its totality. In *Ramirez*, trial counsel failed to object to the State's use of inadmissible prior convictions. Those convictions were hardly the primary evidence of the defendant's guilt; in fact, there were multiple eyewitnesses to the crime who identified the defendant on the stand. However, defense counsel significantly impeached those eyewitnesses during cross-examination. As a result of this eyewitness impeachment, the *Ramirez* court held that, at the end of trial, the defendant's credibility was the only remaining consideration on which the jury could have based its verdict. Accordingly, trial counsel's failure to object to the State's use of inadmissible prior convictions that certainly undermined the defendant's credibility created sufficient prejudice to satisfy the *Strickland* requirement. *See id.*

Gates' failures go far beyond those in *Ramirez*. Not only did he fail to object to the State's use of inadmissible prior statements, but Gates also failed to impeach the State's witness (as counsel in *Ramirez* had done) or challenge the State's primary evidence – Villegas' confession – on its face. Unquestionably, the aggregate effect of these errors prejudiced Villegas'

trial to an even greater degree than the single error deemed prejudicial in *Ramirez.*

These acknowledgements by Gates all ring true given the disturbingly short amount of time – a mere two months – he had to prepare for this complex capital murder trial. Indeed, Gates' unfamiliarity with the basic facts of the case is apparent in the second trial transcript when he erroneously stipulated that Armando Lazo was shot three times (and once in the back), even though it is undisputed that Lazo was shot just twice in the front.

The extent to which the State exploited Gates' litany of errors and omissions during its closing argument at trial underscores the significant, cumulative prejudicial effect of these errors. The State repeatedly pointed to the hearsay statements of Gonzalez and Williams, the lack of evidence about Villegas' particular vulnerability to confession, and the unsupported alibi defense as reasons to convict Villegas. These arguments would not have been available but for Attorney Gates' ineffectiveness. *See Butler*, 716 S.W.2d at 51 (highlighting the State's closing argument pointing to the lack of corroboration for an alibi as a reason for concluding counsel's ineffectiveness in failing to present further evidence of the alibi was prejudicial).

In short, any review of Gates' representation in its totality compels the conclusion that his errors cumulatively prejudiced this trial, in addition to the conflicting evidence addressed in the actual innocence, as well as the newly discovered evidence, and that Applicant Villegas is therefore entitled to the Writ of Habeas Corpus.

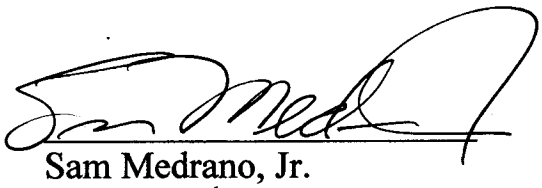
III. CONCLUSION

Whether due to a lack of diligence or the impossibility that any defense counsel could adequately prepare for a capital case of this complexity in just two months, Applicant Villegas received constitutionally deficient assistance that prejudiced his trial. Moreover, this Court believes that the new evidence presented at the writ hearing adequately meets the standard to demonstrate Villegas' actual innocence.

Based on the facts and law presented at the writ hearing and in related filings, this Court concludes that Applicant is illegally confined and restrained in his liberty in violation of the Texas Constitution. This Court hereby strongly recommends that the Texas Court of Criminal Appeals grant his Application for a writ of habeas corpus.

In addition to all of the facts adduced at this hearing, this Court's recommendation of reversal is based on the numerous and inexcusable mistakes and omissions committed by the State of Texas, as well as defense counsel, that have harmed Villegas over the last nineteen years, including, but not limited to, impossible evidence, coerced and unreliable confessions, and a multitude of errors and omissions by defense counsel.

Based on all of the above Findings of Fact and Conclusions of Law, this Court strongly recommends that the Texas Court of Criminal Appeals remand this case for a new trial.



Sam Medrano, Jr.
Judge, 409th District Court

Date

IN THE 409th JUDICIAL DISTRICT COURT

EL PASO COUNTY, TEXAS

STATE OF TEXAS	§	
	§	
v.	§	**No. 940D09328**
	§	
DANIEL VILLEGAS	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANT'S MOTION TO SUPPRESS

On October 15 and 16, 2014, the Court heard Defendant's Motion to Suppress in this case. The Court heard testimony at the hearing, and admitted into evidence certain testimony from previous proceedings in this case and the proceedings on Defendant's application for writ of habeas corpus.

Based on the evidence presented and the Court's evaluation of the weight of the evidence and credibility of the witnesses, the Court enters these findings of fact and conclusions of law.

FINDINGS OF FACT

1. Shortly after 10:00 p.m., on April 21, 1993, Detective Alfonso Marquez and Detective Earl Arbogast of the El Paso Police Department entered the home of Daniel Villegas, with an arrest warrant obtained approximately forty minutes earlier for Marcos Gonzalez. Gonzalez, an adult, was placed under arrest and read his rights. (Tr. 10/15/14, p. 111-12; WH, 9/15/11, 28, 31; WH, Pet. Ex. 46; 1994 SH, 130, 227).[1]

2. As the detectives were leaving, Daniel Villegas asked them why they were arresting Gonzalez. After learning the identity of Villegas, Detective Marquez placed him under warrantless arrest and read him the same rights. (WH, 9/15/11, 28, 31; WH, Pet. Ex. 46; 1994 SH, 130, 227).

3. Daniel Villegas was sixteen years old at the time.

4. The detectives knew that Villegas was a juvenile when they picked him up at his home. (Tr. 10/15/14, p. 61).

[1] Herein, "Tr." refers to the transcript of this October 2014 suppression hearing. At the hearing, the Court admitted into evidence transcripts of previous proceedings in the case: "WH" refers to the transcript of the writ hearing. "T1" refers to Daniel Villegas's first trial in December 1994. "T2" refers to Daniel Villegas's second trial in August 1995. "1994 SH" refers to the pre-trial suppression hearing in December 1994.

5. Detective Marquez did not have Villegas sign a Miranda warning card at his home. (Tr. 10/15/14, p. 120; WH, 6/21/11, 25, 27; WH, 9/8/11, 161-65).

6. Juvenile Investigative Services is a "juvenile processing office" pursuant to Texas Family Code section 52.05(a). (Tr. 10/15/14, p. 182).

7. Detective Arbogast was not aware of the requirement to take a juvenile in custody to Juvenile Investigate Services without undue delay. (Tr. 10/15/14, p. 132).

8. Upon taking him into custody, Detectives Marquez and Arbogast did not take Villegas directly, and without unnecessary delay, to a juvenile procession office or detention office or facility designated by the juvenile court

9. Villegas and Gonzalez were placed in different police cars. Both police cars then drove past the home of Fernando Lujan, who is known by the nickname "Droopy." The officers specifically pointed this house out to Villegas. (WH, 9/15/11, 29-30; 1994 SH, 12/1/94, 158).

10. While in the car, officers asked Villegas if he knew someone named "Snoopy," and Villegas said he did not. (WH, 9/15/11, 30).

11. Both of the police cars then drove to Northpark Mall. While Villegas and Gonzalez stayed in the police cars, the officers met and spoke to each other. (WH 9/15/11,31; 1994 SH 12/1/94, 152, 223).

12. After this meeting, both Gonzalez and Villegas were driven directly to the El Paso Police Headquarters. During this drive, Villegas repeatedly informed Detective Marquez that he was a juvenile. Detective Marquez accused Villegas of lying about his age. (WH, 9/15/11, 31, 33; 1994 SH, 12/1/94, 224-25).

13. At the police station, Detective Marquez threatened Villegas, telling him that he was "going down for the murders," and "We know you did these shootings and we are taking your ass to jail." (WH, 9/15/11, 31-32).

14. About 10-15 minutes after arriving at Police Headquarters, Detective Marquez confirmed that Villegas was, in fact, just sixteen years old. At that point, Detective Marquez told Villegas he was a "lucky punk" and transported him to Juvenile Investigative Services. (WH, 9/15/11, 31, 33; 1994 SH, 12/1/94, 224-25).

15. Detective Ortega testified at the suppression hearing that he was called out to Juvenile Investigative Services at 11:00 p.m. (Tr. 10/15/14, p. 165-66). However, he testified at the first trial that he actually arrived at Juvenile Investigative Services at 11:00 p.m. (Tr. 10/15/14, p. 201; T1 p. 377). He wrote at 11:00 p.m. that Villegas had already given a verbal statement implicating himself. (Tr. 10/15/14, p. 193-94; WH, Pet. Ex. 8).

16. Detective Ortega was informed by 11:00 p.m. that Villegas had given an inculpatory statement, and that he wanted to give a written statement. (WH, Pet. Ex. 3). Detective Ortega testified that Detective Marquez gave him this information. (Tr. 10/15/14, p. 205-06, 211). Detective Ortega specifically testified that Daniel Villegas had given his oral statement to a detective before Judge Horkowitz read him his rights at 12:53 a.m. (Tr. 10/15/14 p. 204).

17. Detective Arbogast testified at the suppression hearing that he does not recall Daniel Villegas being read his Miranda rights at all. (Tr. 10/15/14, p. 80). Detective Arbogast testified at the writ hearing that he was not present when Daniel was given his Miranda warnings. (Tr. 10/15/14, p. 125).

18. Villegas signed a juvenile Miranda warning card at 11:15 p.m. (WH, 6/2 1/11, 206-07; WH, Pet. Ex. 3, 4; T1, 12/8/94, 378).

19. It is the practice of the El Paso police officers to have suspects sign Miranda warning cards at the same time they received their Miranda warnings. (Tr. 10/15/14, p. 111).

20. Detective Arbogast recognized that the documents indicate that Daniel Villegas had given a statement implicating himself by 11:00 PM, before receiving his Miranda warnings. (Tr. 10/15/14, p. 124-25).

21. Detective Arbogast recognized that if Villegas had already given a verbal statement implicating himself at 11:00 PM, but did not sign the Miranda warning card until 11:15 PM, "that is a problem." (Tr. 10/15/14, p. 116).

22. Detective Marquez and Detective Arbogast arrived with Villegas at the Juvenile Investigative Services office at approximately 11:30 p.m. (Tr. 10/15/14, p. 107).

23. Detective Marquez recorded the wrong date upon recording Daniel Villegas's arrival at Juvenile Investigative Services. (Tr. 10/15/14, p. 127).

24. At Juvenile Investigative Services, Villegas was placed in a room and handcuffed to a chair by Detective Marquez. (1994 SH, 227; WH, 6/21/11,42-43; WH, 9/15/11 1,33-35; WH, Pet. Ex. 5).

25. Detective Ortega testified that he arrived at Juvenile Investigative Services between 11:45pm and 12:00 pm, and he gave Villegas his Miranda rights. (Tr. 10/15/14, p. 166, 168).

26. According to Detective Ortega, Villegas signed another juvenile Miranda warning card in front of him after he arrived at the office. (Tr. 10/15/14, p. 191; WH, 6/2 1/11, 206-07; WH, Pet. Ex. 3, 4; T1, 12/8/94, 378).

27. Detective Ortega testified that this juvenile Miranda warning card is missing. It is the first and only Miranda warning card to go missing. (Tr. 10/15/14, p. 192, 194).

28. The Court does not find credible the testimony of Detective Ortega that he gave Villegas his Miranda warnings because this Miranda card cannot be produced by the State of Texas. The testimony regarding this matter is also suspect as this is the first time in over twenty years, the initial motion to suppress, two jury trials, and a Section 11.07 writ hearing, that Detective Ortega testified under oath at this second motion to suppress hearing, that this Miranda warning card is missing.

29. Villegas was questioned by Detective Marquez while at Juvenile Investigative Services, and Villegas testified to the following:

    a. Villegas remained handcuffed to a chair while he was questioned for approximately one hour.

    b. Detective Marquez repeatedly accused Villegas of committing the Electric Street shooting, telling him that Rodney Williams had implicated him.

    c. Detective Marquez threatened Villegas that if he did not confess, he would be put in county jail to be "raped and fucked by a bunch of fat faggots."

    d. Detective Marquez also threatened to "kick his ass" and to take him to the desert and beat him if he did not admit to the shooting.

    e. When Villegas maintained his innocence, Detective Marquez slapped him. Villegas had never been interrogated before and was "terrified out of his mind." (WH, 9/15/11, 35-36; T1, 12/12/94, 813-18).

30. Villegas was next handcuffed and walked over to the Juvenile Probation Department, where Officer Mario Aguilera documented his intake at 12:26 a.m. and wrote that Villegas had agreed to give a confession. (WH, 6/21/11, 212; SM, 11/30/04, 20; WH, Pet. Ex. 6).

31. At some unknown time before between 12:26 and 12:53 a.m., Detective Marquez took Daniel Villegas back to Juvenile Investigative Services. It was Detective Marquez's responsibility to sign Daniel Villegas in when he returned and record the time, but he failed to do so.

32. Villegas was next taken before Magistrate Carl Horkowitz, who was required to warn him of his rights prior to any interrogation.

33. Prior to this meeting with Magistrate Horkowitz, Villegas testified that Detective Marquez warned Villegas that if he did not agree to give a statement, he would beat him and put him in jail. Specifically, Villegas testified that Detective Marquez threatened: "You are going to tell the judge that you are going to make a statement and if you don't you already know what I am going to do to you, motherfucker. I am going to take you to the desert and beat your ass." (WH, 6/21/11, 56-57; WH, 9/15/11, 39).

34. At 12:53 a.m., Villegas told Magistrate Horkowitz that he would give a statement, but testified that he did so only because he was "mentally paralyzed" by Detective Marquez's continual threats. (WH 9/15/11, 38-39).

35. Villegas was then driven back to Juvenile Investigative Services. There is no documented evidence, once again, that Detective Marquez signed Daniel Villegas in and recorded the time of his arrival. (Tr. 10/15/14 p. 142-43).

36. Villegas testified that he was then driven back to Juvenile Investigative Services, where he was handcuffed and questioned once again by Detective Marquez. After being told by Det. Marquez that Williams had already implicated him, Villegas testified he told Detective Marquez the following while Detective Marquez typed the statement: On the night of the murder, Villegas and Williams were at the Village Green Apartments, when they were approached by a group of black males with a gun. Williams alone left with the black males, telling Villegas that he was going to do "something crazy." Williams returned later and told Villegas that he had killed Lazo and England. (WH, 9/15/11, 40).

37. Villegas testified that after he finished this statement, Detective Marquez then took the paper from the typewriter, crumpled it up, and slapped Villegas. Detective Marquez then threatened Villegas that he would pull the switch on the electric chair himself if Villegas did not confess to being the shooter. (WH, 9/15/11, 40-41).

38. Detective Marquez then waived Williams' statement at Villegas and told him that Williams had named "Snoopy" and Marcos Gonzalez as accomplices. Villegas told Detective Marquez that he did not know anyone named "Snoopy," although he did know someone nicknamed "Droopy." (WH, 9/15/11, 44).

39. Detective Marquez then left the room, but returned shortly thereafter to tell Villegas that Marcos Gonzalez had also implicated Villegas as the shooter. (WH, 9/15/11, 46).

40. While Detective Marquez was interrogating Daniel Villegas, Detective Graves was simultaneously interrogating Marcos Gonzalez. Marcos Gonzalez gave a first statement. Detective Graves and Detective Marquez communicated with each other about the statements. After Detective Graves consulted with Detective Marquez about the information provided by Daniel Villegas, Detective Graves confronted Marcos Gonzalez with this information. Marcos Gonzalez then changed his statement to conform to the information that Detective Marquez gave Detective Graves.

41. Villegas testified that Detective Marquez's physical and psychological coercion, including threats of incarceration and physical harm, left Villegas "mentally drained" and "exhausted" to such an extent that he finally agreed to falsely implicate himself as the shooter. (WH, 9/15/11, 44-45, 49).

42. Daniel Villegas agreed to sign a one-page statement prepared by Detective Marquez. (WH, St. Ex. 1).

43. Daniel Villegas' signed statement contains false and factually impossible evidence when compared to the physical evidence and testimony. (Tr. 10/15/14, p. 142-50; WH, 9/8/11, 130-33, 153-54, 195, 205-06, 212-15; WH, 9/15/11, 59; WH, St. Ex. 1, Pet. Ex. 24, 26, 29, 51, 56, 61; T2, 8/24/95, 167-68).

44. Detective Arbogast testified that he is not aware of any evidence corroborating any part of Daniel Villegas's statement. (Tr. 10/15/14, p. 152).

45. Detective Marquez finished typing the statement at 2:26 a.m. on April 22, 1993. Villegas was then taken back to Magistrate Horkowitz, where, after being given Miranda warnings, he signed the statement at 2:40 a.m. (WH, St. Ex. 1).

46. Detective Arbogast is unable to explain what the detectives did with Daniel Villegas for the two-hour span between when he signed his statement, and 4:20 a.m. when he was taken to the Juvenile Probation Department. (Tr. 10/15/14, p. 144).

47. As soon as he was away from Detective Marquez, Daniel Villegas recanted his statement to Monica Sotelo, a juvenile probation officer. Officer Sotelo noted that Villegas was shaking and looked scared. He informed Officer Sotelo that "he didn't do it," and that he was not in the area where the crime occurred that night. He told her that he only confessed because "the cops kept harassing him." He told her that he was "tired and [he] wanted to go back to sleep, so [he] told them what they wanted to hear." (Tr. St. Ex. 1; WH, Pet. Ex. 42).

48. At the 2014 suppression hearing, Officer Sotelo testified that she did not recall Daniel Villegas specifically, but was testifying based on her review of her notes. She testified that if Daniel Villegas had informed her of the specific details of Detective Marquez's threats, she would have put those details in her notes. However, she admitted that she did not ask Daniel Villegas those specific questions. Officer Sotelo further testified that Villegas barely realized at the time that the confessions and statements made him out to be the shooter. She reaffirmed that Daniel Villegas appeared scared, and reported to her that he was not guilty, that he was being harassed, that he was being threatened, and that he was only confessed because he was being harassed and was tired and wanted to go to sleep, so he told them what they wanted to hear. (Tr. 10/15/14, 24, 31-32, 36-39).

49. Priciliano Villegas, Daniel Villegas' adopted father, testified that Daniel Villegas has a learning disability, reads poorly, and dropped out of school in seventh grade. He described Villegas as impressionable, easy to trick, someone who thought more like a child than an adult, and tells people what they want to hear. He also testified that Daniel Villegas was "hyper" and prone to boasting. (T1, 12/9/94, 647-49, 651-52, 655).

50. Patricia Cate, who is the aunt of Villegas and had known him his whole life, testified that he was prone to boasting and exaggeration. (T1, 12/9/94, 701, 704-06).

51. Dr. Angel Marcelo Rodriguez-Chevres, a forensic psychiatrist who conducted a court-ordered psychiatric evaluation of Villegas, testified that Villegas likely had a learning disability, attention deficit disorder, emotional problems, and possible mild mental retardation, all of which could make him impulsive and a poor decision-maker. Dr. Rodriguez-Chevres also testified that there is a "strong possibility" that these traits could make Villegas easily influenced by a police interrogation. (T1, 12/12/94, 742-50; WH, Pet. Ex. 72).

52. Jesus Lechuga, who was the bond officer for Villegas prior to trial and the individual to whom Villegas reported for 12-18 months testified that Villegas was a very poor reader with very poor comprehension; indeed, Villegas did not understand that a "home" was the same thing as a "house." (WH, 6/22/11, 167, 169-71).

53. Alberto Renteria, who was a detention officer at the Juvenile Probation Department in 1993 when Villegas was in custody testified that Villegas was a "very slow thinker" and had a very difficult time understanding Renteria's instructions. (WH, 6/22/11, 122).

54. On April 12, 1993, Jesse Hernandez, a surviving victim, was brought back to the police station by Detective Marquez for further questioning, where Hernandez testified that the following occurred: (WH, 6/22/11, 54-55).

    a. Detective Marquez asked Hernandez to write out a description of the events leading up to and including the Electric Street shootings. While Hernandez was writing, Marquez took the statement, told him to "just cut the bullshit," and threw the statement back at Hernandez.

    b. Detective Marquez accused Hernandez of killing his friends and lied to him by telling Hernandez that Juan Medina had already implicated him.

    c. Detective Marquez threatened Hernandez that if he didn't confess, he would go to jail and get the death penalty.

    d. Hernandez did not confess to the crime. However, he testified that he was close to confessing to the killing of his friends based on Detective Marquez's interrogation.

55. On April 15, 1993, based on a tip, Detective Marquez participated in the arrest, transport from New Mexico to El Paso, and subsequent questioning of fifteen-year-old Michael Johnston. Michael Johnston testified as follows:

    a. Detectives Marquez and Graves interrogated Michael Johnston for eight hours from 7:00 p.m. on April 15 until 3:00 a.m. on April 16, 1993.

    b. Johnston was handcuffed during the entire eight hours and was unaccompanied by his parents.

c. Detective Marquez accused Johnston of shooting Lazo and England and lied to him that Johnston's friend had implicated him.

d. Detective Marquez threatened Johnston with the electric chair if he did not confess, promising to pull the switch himself.

e. Detective Marquez further threatened to take Johnston to jail where he would be molested and raped if he did not confess, but he promised to let Johnston off easy if he did confess.

f. Johnston confessed to shooting Armando Lazo and Robert England.

g. Johnston was never charged with this offense. Detective Marquez later admitted that Johnston's confession was false. (T1, 12/8/94, 312, 317; T1, 12/9/94, 596, 598-99; WH, 9/8/11, 41; WH, 9/9/11, 4-7; WH, Pet. Ex. 49).

56. On April 21, 1993, the El Paso Police Department contacted Patricia Cate, telling her they needed to speak to her seventeen-year-old son David Rangel regarding a telephone harassment complaint that had been filed against him and threatening her with obstruction of justice if she did not cooperate. David Rangel is Daniel Villegas' cousin. Rangel was subsequently picked up by investigating detectives and questioned at the police station by Detectives Marquez and Lozano. David Rangel testified as follows:

a. David Rangel was never questioned about a telephone harassment complaint. The sole topic discussed was the shooting on Electric Street.

b. Detective Marquez accused Rangel of committing the murders and lied to him that others had already implicated him in the shooting.

c. Detective Marquez threatened Rangel with life in prison if he did not confess and warned him that he was a "pretty white boy with green eyes" who could expect to be "fucked" in prison.

d. Rangel wrote a statement documenting this phone call with Villegas and Gonzalez, wherein he noted that Villegas had admitting shooting at the victims with a sawed-off shotgun.

e. Detective Marquez, after reading the statement, threw it in the garbage and told Rangel it was "not correct" that Villegas used a shotgun.

f. Detective Marquez ordered Rangel to sign another statement that purported to document the phone conversation but that did not mention the type of gun used. Marquez threatened that if Rangel did not sign the new statement, he would be charged with the crime and would not be released. Rangel signed the statement, explaining that he was willing to sign "pretty much what was in front of" him as he was "just [wanting] to get out of there." (T1, 12/8/94, 146; T1, 12/9/94, 696;

WH, 6/22/11, 113, 118-36).

57. The State of Texas did not call Detective Marquez to testify at the suppression hearing.

58. The previous testimony of Detective Marquez, which was admitted into evidence at the suppression hearing, is not credible. This Court reaches this finding based on the corroborating evidence presented that supports the claim that Detective Marquez had a pattern and practice of using illegal and coercive interrogation tactics both in this investigation and others, such as:

a. Detective Marquez's testimony that Villegas had not been questioned prior to the 12:26 a.m. intake at the juvenile probation department is contradicted by the intake log stating that he had already agreed to "give a confession" by this time. (WH, Pet. Ex. 6).

b. Detective Marquez's testimony that Villegas had not been questioned prior to the 12:26 a.m. at the juvenile probation department is contradicted by Detective Ortega's testimony that he had been informed by another detective by 11:00 pm. that Villegas had given an inculpatory statement, and that he wanted to give a written statement. Detective Ortega testified at the suppression hearing that Detective Marquez gave him this information. (WH, Pet. Ex. 3; Tr. 10/15/14, p. 211).

c. Testimony from other law enforcement officers contradicted Detective Marquez's testimony:

i. Denying that he stopped at Northpark Mall or going to Police Headquarters,

ii. That he ordered other detectives to retrieve what may have been a tape exculpatory to Villegas, and

iii. That he never communicated with Detective Graves while they were in the midst of the interrogations of Villegas and Gonzalez.

d. Testimony from Detective Marquez during the writ hearing that on a previous occasion, he wore a "smock" commonly worn by medical personnel, during the interrogation of a criminal suspect. He further testified that the smock was not used for deception purposes. This Court finds no conceivable way that the wearing of a smock commonly worn by medical personnel, was not intended to deceive an accused into believing that he was talking to medical personnel and not law enforcement.

59. Michael Gibson and Bruce Weathers, both practicing attorneys in El Paso, testified that Detective Marquez has a reputation for untruthfulness. Gibson, a former First Assistant Chief Felony Prosecutor and Director of the Organized Crime Unit in El Paso, actually

twice presented a perjury indictment to the grand jury against Marquez. (T1, 12/9/1994, 550-80; T1, 12/12/1994, 786).

60. Michael Johnston, as well as his mother Barbara Hoover, testified that Detective Marquez used illegal interrogation tactics leading to Johnston's own false confession to the Electric Street murders. (TI, 12/ 9/1994, 587, 589).

61. Detective Marquez himself was recalled and testified that he had been the subject of a number of Internal Affairs investigations. He also testified that there have been roughly thirty citizen complaints against him as of 1994. (T1, 12/9/94, 678-80)

62. Daniel Villegas testified to the threats made to him by Detective Marquez during the interrogation, and the other surrounding circumstances of his interrogation. (TI, 12/12/94, 813-23).

63. Detective Marquez testified in the second trial of Daniel Villegas that he could get a confession at any point if "he really wanted to." (WH, 9/8/11, 122-23).

64. For all of these reasons, the Court finds that Detective Marquez's prior testimony in connection with this matter is not credible, and gives Detective Marquez's testimony little to no weight.

65. The State called Detectives Arbogast, Ortega, and Graves to testify at the 2014 suppression hearing.

66. Each of the detectives called to testify at the suppression hearing has testified that there were times when Daniel Villegas was with Detective Marquez and out of their presence. Specifically,

    a. Detective Arbogast was not present with Detective Marquez the entire time he was with Daniel Villegas. (Tr. 10/15/14, p. 106).

    b. Detective Arbogast was not with Detective Marquez and Daniel Villegas when Villegas's statement was taken. (Tr. 10/15/14, p. 72).

    c. Detective Arbogast was not with Detective Marquez and Daniel Villegas for approximately an hour after he arrived at Juvenile Investigative Services, and did not know what happened during that period of time. (Tr. 10/15/14, p. 107-08, 126-27).

    d. Detective Arbogast did not know what Detective Marquez did outside of his presnce. (Tr. 10/15/14, p. 106, 127, 163).

    e. Detective Arbogast testified that he could not say whether it was true that Detective Marquez threatened or beat Daniel Villegas, told him he was going to be raped, or threatened to take Villegas to the county jail and pull the switch

himself. (Tr. 10/15/14, p. 107).

f. Detective Arbogast testified that he was not aware of all of the tactics Detective Marquez used to try to get witnesses to give statements, such as wearing a medical smock. (Tr. 10/15/14, p. 162).

g. Detective Ortega testified that he did not recall whether he arrived at Juvenile Investigative Services before or after Detective Marquez and Daniel Villegas. (Tr. 10/15/14, p. 167-68).

h. Detective Ortega testified that he does not know what was going on with Villegas before he arrived at Juvenile Investigative Services. (Tr. 10/15/14, p. 204-05).

i. Detective Ortega also testified that he did not know what was going on while Villegas was at Juvenile Investigative Services for the hour between 11:30 and 12:26. (Tr. 10/15/14, p. 204-05).

h. Detective Ortega testified that he may have taken a bathroom break while Detective Marquez was interrogating Daniel Villegas. (Tr. 10/15/14, p. 176).

i. Detective Ortega likewise testified only that Detective Marquez's acts towards Daniel Villegas did not occur in his presence, not that they did not occur. (Tr. 10/15/14, p. 190). He testified that he did not know what occurred between Detective Marquez and Daniel Villegas when he was not around. (Tr. 10/15/14, p. 206).

j. Detective Graves interrogated Marcos Gonzalez separately in a different location while Detective Marquez was interrogating Daniel Villegas. (Tr. 10/15/14, p. 243-44).

67. The detectives who testified at the suppression hearing also admitted to not recalling the details of this particular investigation:

a. Detective Arbogast admitted that there were a lot of details he couldn't remember. (Tr. 10/15/14, p. 105).

b. Detective Arbogast does not remember the conversation held by the officers during the stop at Northpark mall. (Tr. 10/15/14, p. 131-32).

c. Detective Arbogast does not remember much of what happened during the two-hour span between leaving Judge Horkowitz and the arrival at Juvenile Probation Department. (Tr. 10/15/14, p. 144).

d. Detective Arbogast admitted that his memory doesn't usually get better with time (Tr. 10/15/14, p. 107).

e. Detective Ortega testified that he did not recall whether he arrived at Juvenile Investigative Services before or after Detective Marquez and Daniel Villegas. (Tr. 10/15/14, p. 167-68).

f. Detective Ortega testified that he does not have independent recollection of what occurred in this investigation. (Tr. 10/15/14, p. 198).

g. Detective Ortega also testified that his own memory has not gotten better with time. (Tr. 10/15/14, p. 198).

h. Detective Graves testified that he does not recall what was said during the stop at Northpark mall. (Tr. 10/15/14, p. 230).

i. Detective Graves testified that he does not recall which detective he was communicating with while he was interrogating Marcos Gonzalez. (Tr. 10/15/14, p. 243). However, in the first trial he remembered that it was Detective Marquez. (T1, p. 494).

j. Detective Graves testified that he does not recall the meaning of the annotations on complaint affidavits prepared on the computer system used in 1993. (Tr. 10/15/14, p. 251).

k. Detective Graves testified that he does not recall whether he went to the magistrate to obtain the warrant for Marcos Gonzalez. (Tr. 10/15/14, p. 253).

l. Detective Graves testified that he has "worked a lot of murders in my career and it is hard to remember every single detail from every single one." (Tr. 10/15/14, p. 253).

68. The testimony of the detectives at the suppression hearing contradicted their previous statements and the testimony of the other detectives in several respects:

a. Detective Arbogast first testified at the suppression hearing that he arrived at Villegas's home at 10:45; but when he previously spoke with Villegas's counsel, he did not have independent recollection of the time and not recall whether it was 10:00 or 10:45; and he subsequently conceded that he did not actually recall what time they arrived. (Tr. 10/15/14, p. 60, 107, 115).

b. Detective Arbogast first testified at the suppression hearing that the detectives did not take Villegas to the police station before taking him to Juvenile Investigative Services; but he previously stated that he did not remember. (Tr. 10/15/14, p. 66, 86, 121-22).

c. Detective Arbogast has testified inconsistently regarding whether he was with Detective Marquez on the way back to Juvenile Investigative Services after appearing before Judge Horkowitz. (Tr. 10/15/14, p. 128-30; WH 6/21/11, 56).

d. Detective Ortega has testified inconsistently about the time he arrived at Juvenile Investigative Services. (Tr. 10/15/14, p. 192-93, 200-01).

e. Detective Ortega changed his original testimony. He first testified unequivocally that he knew the defendant had given a statement implicating himself because Detective Marquez told him. (Tr. 10/15/14, p. 211). When the State suggested that he was assuming that, he testified that he was assuming. (Tr. 10/15/14, p. 211). He admitted that he changed his answer under oath within a matter of minutes. (Tr. 10/15/14, p. 216).

f. Detective Ortega testified that, to the best of his recollection, he was called out at 11:00 pm to help with the confession process, and arrived at Juvenile Investigative Services between 11:45 pm and 12:00 am, and that he was not with Detective Marquez prior to the time he arrived at Juvenile Investigative Services. (Tr. 10/15/14, p. 165-66, 181). He specifically testified that he did not assist Detective Marquez with the arrest of Daniel Villegas at his home. (Tr. 10/15/14, p. 202-03). However, Detective Graves testimony contradicts Detective Ortega as he testified that Detective Ortega was at Daniel Villegas's home at the time of the arrest. (Tr. 10/15/14, p. 229).

CONCLUSIONS OF LAW

1. At the relevant date, Texas Family Code § 52.02 stated as follows:

   (a) A person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under Section 52.025 of this code, shall do one of the following:

      (1) release the child to a parent, guardian, custodian of the child, or other responsible adult upon that person's promise to bring the child before the juvenile court as requested by the court;

      (2) bring the child before the office or official designated by the juvenile court if there is probable cause to believe that the child engaged in delinquent conduct or conduct indicating a need for supervision;

      (3) bring the child to a detention facility designated by the juvenile court;

      (4) bring the child to a medical facility if the child is believed to suffer from a serious physical condition or illness that requires prompt treatment; or

      (5) dispose of the case under Section 52.03 of this code.

   Act of May 26, 1991, 72nd Leg., R.S., ch. 495, § 1, Tex. Gen. Laws 1738. *See also Le v. State*, 993 S.W.2d 650, 655 (Tex.Crim.App. 1999) (explaining that this version of the statute was in effect at the time of the statements at issue).

2. The Texas Family Code restricts the actions of law enforcement officers while a juvenile is in custody. TEX.FAM.CODE § 52.02.

3. If a juvenile's statement is illegally obtained under any of the applicable provisions of the Texas Family Code, the statement is inadmissible against him in a criminal trial, following transfer for criminal proceedings treating him as an adult. *Le v. State*, 993 S.W.2d 650, 656 (Tex.Crim.App. 1999).

4. Based on the Court's findings of facts stated above and the Court's evaluation of the weight of the evidence presented and the credibility of the witnesses, the State has not carried its burden to prove that the statements of Daniel Villegas on April 21 and 22, 1993, were voluntary.

5. Based on the Court's findings of facts stated above and the Court's evaluation of the weight of the evidence presented and the credibility of the witnesses, the State has not carried its burden to prove that Daniel Villegas knowingly, intelligently and voluntarily waived his rights not to make a statement prior to and during the making of any statements he gave on April 21 and 22, 1993.

6. Based on the Court's findings of facts stated above and the Court's evaluation of the weight of the evidence presented and the credibility of the witnesses, the statements of Daniel Villegas on April 21 and 22, 1993 were obtained in violation of his right to due process, because the statements were obtained by coercive conduct by police officers of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by Daniel Villegas.

7. Based on the Court's findings of facts stated above and the Court's evaluation of the weight of the evidence presented and the credibility of the witnesses, the El Paso Police Department detectives failed to comply with Texas Family Code section 52.02 while Daniel Villegas was in custody.

8. Based on the Court's findings of facts stated above and the Court's evaluation of the weight of the evidence presented and the credibility of the witnesses, the statements of Daniel Villegas on April 21 and 22, 1993 were obtained in violation of Texas Family Code section 52.02, and this statutory violation caused Daniel Villegas to give the statements.

9. The Court finds that the statements made by Daniel Villages on April 21 and 22, 1993 would not have been made but for the officers' unnecessary delay in bringing Daniel Villegas to Juvenile Investigative Services.

10. The Court finds that Detectives Marquez and Arbogast went to Daniel Villegas's home at 10:00 p.m., where Villegas was picked up. Marquez and Arbogast arrived with Villegas at Juvenile Investigative Services at 11:30 p.m. The transport time from Daniel Villegas's home to Juvenile Investigative Services is 15 minutes. Daniel Villegas was taken Northpark mall, looking for Droopy and Popeye's homes, as well as debriefing by detectives, then Daniel Villegas was transported to El Paso Police Department headquarters, not a juvenile processing office, before he was finally taken to Juvenile Investigative Services. The Court finds there was unnecessary delay in transporting Daniel Villegas to Juvenile Investigative Services.

11. The Court finds, based on the evidence, that the unnecessary delay in bringing Daniel Villegas to Juvenile Investigative Services, gave Detective Marquez the time and opportunity to threaten, coerce, and intimidate Daniel Villegas, a sixteen-year-old child. During this period of time, Detective Marquez accused Daniel Villegas of lying and engaged in a pattern of coercion and intimidation that continued until Villegas signed a written statement. The Court finds, based on the evidence, that the failure to comply with Family Code §52.02 was a cause of Daniel Villegas' involuntary statement on April 21 and 22, 1993. *See Comer v. State*, 776 S.W.2d 196-96 (Tex.Crim.App. 1989).

12. The statements of Daniel Villegas taken on April 21 and 22, 1993 must be suppressed for the following reasons:

a. The State of Texas has failed to meet its burden to show that the statement was voluntary;

b. The State of Texas has failed to meet its burden to show that Daniel Villegas knowingly, intelligently, and voluntarily waived his right to not make a statement;

c. El Paso Police Detective Al Marquez obtained Daniel Villegas' statement in violation of his constitutional rights to Due Process, guaranteed under the United States Constitution and the Texas Constitution and Texas Family Code §52.02.; and

d. The Court finds that the testimony of El Paso Police Detectives Al Marquez and Carlos Ortega were not credible to the issues of voluntariness of the Accused statement and compliance with the United States Constitution, the Texas Constitution and Texas Family Code §52.02.

13. IT IS SO ORDERED, ADJUDGED, AND DECREED by this Court that any and all statements made by Daniel Villegas on April 21 and 22, 1993, are hereby SUPPRESSED, and shall not be admitted into evidence at the trial of this matter.

SIGNED THIS 3rd day of November, 2014.

Hon. Sam Medrano, Judge
409th Judicial District Court

APPENDIX 3

CAUSE NO. 940D09328

THE STATE OF TEXAS	§	
V.	§	**IN THE 409th DISTRICT COURT**
DANIEL VILLEGAS	§	**EL PASO COUNTY, TEXAS**

STATE'S NOTICE OF APPEAL

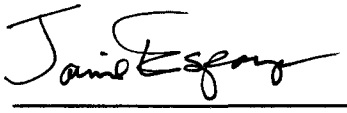
COMES NOW, the State of Texas, in the above styled and numbered cause, by and through the District Attorney of the 34th Judicial District, and files this Notice of Appeal, pursuant to Rule 25.2 of the Texas Rules of Appellate Procedure, as follows:

I.

The State of Texas hereby gives written notice of appeal to the Court of Appeals for the Eighth District of Texas at El Paso, from the pretrial order, signed on January 5, 2015, excluding the State's evidence as irrelevant and inadmissible, specifically, audio recordings of the defendant's jail and prison telephone conversations, which contain incriminating evidence. The State is entitled to appeal from the order of the trial court. *See* TEX. CRIM. PROC. CODE art. 44.01(a)(5) (article setting out the State's entitlement to appeal an order granting a motion to suppress evidence); *see also State v. Medrano*, 67 S.W.3d 892, 903

(Tex.Crim.App. 2002) (holding that the State may appeal an adverse pretrial ruling that seeks to exclude evidence as inadmissible rather than to suppress evidence as illegally obtained). The State certifies that jeopardy has not attached in this case, the appeal is not taken for the purpose of delay, and the evidence is of substantial importance in the case.

Respectfully submitted,



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ATTORNEY FOR THE STATE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing notice of appeal was mailed by regular mail, and an electronic copy was emailed, on January 5, 2014, to the defendant's attorney: Joe A. Spencer, Jr., Law Office of Joe Aureliano Spencer, Jr., 1009 Montana Ave., El Paso, Texas 79902; by email: joe@joespencerlaw.com.

JAIME ESPARZA